Supreme Court, U.S.
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OFFICE OF

No. 01-

IN THE

Supreme Court of the United States

EDWARD J. FOLEY, SR.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a Federal Court of Appeals reviews an ERISA § 502(a)(1)(B) denial of benefits claim under an arbitrary and capricious standard of review may it reverse the District Court's conclusion that the Trustees acted in an arbitrary and capricious manner when they denied benefits by offering a rationale specifically rejected by the Trustees and which was not otherwise a basis for denial or litigated in the lower court?

PARTIES TO THE PROCEEDINGS

Petitioner

Edward J. Foley, Sr.

Respondent

International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

Other Parties

The International Brotherhood of Electrical Workers Local 98; Trustees John J. Dougherty, Edward Neilson Joseph Agresti, Thomas J, Reilly, Jr., Dennis Link, William Rhodes, Roy Dantz and Larry Bradley and Union Officers John J. Dougherty, Edward Neilson and Fred Compton were parties to the proceedings below and have no interest in the outcome of the petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	2
Statement of the Case	2
The Proceedings Below	3
Reasons for Granting the Writ	6
The Panel Decision sets up a needless conflict with all other Circuits who have been presented with this issue.	6
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) 10

Denton v. First Natl. Bank, 765 F.2d 1295 (5th Cir. 1985) 9, 10

Dishman v. UNUM Life Ins. Co. of America, 250 F.3d 1272 (9th Cir. 2001) 8

Doe v. Group Hospitalization, 3 F.3d 80 (4th Cir. 1993) 7

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 6

Marolt v. Alliant Techsystems, Inc. 146 F.3d 617 (8th Cir. 1998) 8

Matuszak v. Torrington Co., 967 F.2d 320 (7th Cir. 1991) 9

Richardson v. Central States Pension Fund, 645 F.2d 660 (8th Cir. 1981) 10

Sandoval v. Aetna Life, 967 F.2d 377 (10th Cir. 1992) 8

Schadler v. Anthem Life Insurance, 147 F.3d 388 (5th Cir. 1998) 9

Cited Authorities

	Page
Sheldon v. Barre Belt Granite, 25 F.3d 74 (2d Cir. 1994)	7
Short v. Central States Pension Fund, 729 F.2d 567 (8th Cir. 1984)	10
Skretvedt v. E.I. Dupont, 268 F.3d 167 (3d Cir. 2001)	7, 8, 9
University Hospitals of Cleveland v. Emerson Electric Co., 202 F.3d 839 (6th Cir. 2000)	6, 7, 8
Statutes:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 1132(a)(1)(B)	i, 2, 6, 7, 10
29 U.S.C. § 1132(g)	4
Other Authority:	
IBEW Local 98 Pension Plan, Article 1, § C(1)(c)(i)	2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed November 8, 2001 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated And Filed March 29, 2000 ..... 20a

Appendix C — Memorandum Of The United States District Court For The Eastern District Of Pennsylvania Dated And Filed December 7, 2000 ..... 60a

Appendix D — Opinion And Judgment Of The United States District Court For The Eastern District Of Pennsylvania Dated August 25, 2000 And Filed August 28, 2000 ..... 74a

Appendix E — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated December 20, 2001 ..... 91a

Edward J. Foley, Sr., respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 263 F.3d 339 (3d Cir. 2001), and is reproduced in App. A at 1a-19a. The opinion and Order of the United States District Court for the Eastern District of Pennsylvania denying in part and granting in part cross motions for summary judgment is reported at 91 F. Supp. 2d 797 (E.D. Pa. 2000) and is reproduced in App. B at 20a-59a. The opinion and Order of the United States District Court for the Eastern District of Pennsylvania awarding the petitioner attorneys' fees is unreported and is reproduced in App. C at 60a-73a. The findings of fact, conclusions of law and verdict of the United States District Court for the Eastern District of Pennsylvania is reported at 112 F. Supp. 2d 411 (E.D. Pa. 2000) and is reproduced in Appendix D at 74a-90a. The decision of the Third Circuit Court of Appeals denying the petition for rehearing is unreported and is reproduced in App. E at 91a-93a.

STATEMENT OF JURISDICTION

The opinion of the Third Circuit Court of Appeals was issued on November 8, 2001. A timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on December 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Employee Retirement Income Security Act of 1974 § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) provides, among other things, that "A civil action may be brought by a participant or beneficiary . . . to recover benefits due him under the terms of his plan . . ."

STATEMENT OF THE CASE

The petitioner, Edward J. Foley, Sr., ("Foley") a participant and former trustee in the IBEW Local 98 Pension Plan, ("Plan") suffered a break in service in 1973 and forfeited 12 and half years of credited service. (App. D, at pp. 75a-76a) In 1988 Foley was granted an exception to this break in service pursuant to Article 1, § C(1)(c)(i) of the Plan when the Trustees determined that he was continuously available for work but unable to locate work during the period of his break in service. (App. D at pp. 76a-77a)

Approximately six years later Fred Compton ("Compton"), a former political rival, mailed a letter to Plan alleging that Foley "may have . . . misled or misinformed the Trustees" with respect to the restoration of his pension credits. The Plan reviewed this matter for a second time and found that the accusations were baseless and groundless (App. D pp. 77a, 81a-82a, note 2). Plan Counsel, Laurance Baccini prepared notes of this second review and acknowledged to Foley "there is *no* finding of wrongdoing, deceit, or misbehavior, or cover up" (App. D, pp. 81a-82a, note 2)

The "Confidential Report" was provided to Foley as the basis for the removal of the pension credits. In the report

Foley was compared to the 21 other individuals who had ever applied for the exception to the break in service rule and the Trustees found Foley to be similarly situated to these 21 individuals. (App. D, at pp. 78a, 81a, App B, at pg. 37a, note 12) Even though Foley was found to be similarly situated to the other participants and that the evidence he had presented to the Trustees was no different quantitatively or qualitatively from the others the Trustees removed the credits.

Foley appealed this decision several times and on each occasion his appeal was denied due to insufficient evidence. Foley was thus compelled to file the instant lawsuit.

THE PROCEEDINGS BELOW

The Plan changed its rationale for denial on a number of occasions during the course of this litigation. Initially, Plan Counsel argued that the Trustees were entitled to treat Foley differently than all other plan participants merely because unsubstantiated allegations were raised against him. (App. B, at pg. 38a, note 14) The District Court labeled this argument specious (App. B, at pg. 38a, note 14) This argument was abandoned and Plan Counsel next argued that the Trustees were entitled to treat Foley differently than the other Plan participants because he was a former Trustee and past President of Local 98.

At trial the Trustees rejected any and all rationale's holding Foley out to be different than any other Plan participant. Rejecting each of the previous arguments for disparate treatment the Trustees testified in District Court that they did not apply a stricter standard of proof to Foley's claim for benefits and thus did not treat him differently from the other plan participants. (App. D, pg. 82a) Their rationale

for reinstating the break in service was simply that he did not submit sufficient evidence.

During closing argument after two days of trial Plan counsel ignored the testimony of the Trustees and the documentary evidence that Foley was the same as all other participants and instead argued that the Trustees could treat Foley differently because he did not sign the out of work book. (App. D, pp. 81a-82a, note 2) The District Court rejected plan counsels arguments that ran contrary to the Trustees testimony and documents introduced into evidence and instead accepted the Trustees testimony that they believed in good faith that they treated Foley the same as all other plan participants. (App. D, at pg. 82a) Because the Trustees held Foley to a higher evidentiary standard than any other Plan participant who had sought refuge under the exception to the break in service rule the District Court found that the Trustees arbitrarily and capriciously denied Foley pension benefits and ordered the pension credits reinstated. (App. D, at pp. 80a, 85a, 87a, 88a). The District Court thereafter ordered that the attorneys' fees incurred by Foley in the prosecution of this claim be reimbursed pursuant to § 502(g) of ERISA (App. C)

On appeal the Defendants next argued that they could treat Foley differently than all other Plan participants because questions of impropriety were raised and he was a former Trustee. A panel of the Third Circuit Court of Appeals adopted this new rationale and found that it was not arbitrary and capricious to not treat Foley the same as the other Plan participants. (App. A, pg. 9a) The stated rationale of the Panel was that Foley was not similarly situated to the other participants; a rationale specifically rejected by the Trustees. The Panel stated that Foley was not similar because "he was

a Trustee", "issues of impropriety were raised" and his "entitlement to benefits under the exception was challenged." (App. A, pp. 9a-13a) Thus the Panel agreed with the District Court that Foley was treated differently than all other Participants. They however reached a different conclusion than the District Court by holding that permissible disparate treatment is appropriate merely upon the specter of raising allegations, a rationale specifically rejected by the board of Trustees.

Beyond the post hoc rationalization put forth by the Defendants and adopted by the Panel, the Third Circuit also engaged in its own post hoc rationalization to permit disparate treatment. The Panel offers a myriad of reasons why Foley should not be compared to the 20 other individuals who have ever sought refuge under the exception to the break in service rule and in doing so completely ignores the Trustees position that Foley was treated the same as all other individual participants. (App. A at pg. 16a) This judicially created rationale completely ignores the fact that it was the Trustees who conducted the research and located the 20 individuals who applied for the exception in the last 20 years and then compares his claim to the claims of these 20 participants. And it was the Trustees who concluded in the confidential report that Foley was no different than the other individuals who received the benefit. Foley was the same as these 20 other participants precisely because the Trustees believed he was the same. The Panel turns the Trustees comparisons and conclusions on their heads to support its own separate and distinct theory of permissible disparate treatment. (App A at pg. 16a)

Foley petitioned for rehearing en banc requesting the Court to avoid the needless conflict with all other Circuit

Courts of Appeals. A majority of the Circuit Judges did not vote for a hearing en banc thus requiring the filing of this writ in an effort to address this needless conflict. (App. E)

REASONS FOR GRANTING THE WRIT

The Panel Decision sets up a needless conflict with all other Circuits who have been presented with this issue.

Fourteen years ago this Court established the standard of review governing all § 502(a)(1)(B) claims for benefits in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). This Court declared that the decisions of Trustees are to be reviewed de novo unless the Plan reserves discretionary authority. As a result of *Firestone* Plans now, as a matter of course, routinely reserve discretion. The lower courts were then faced with the issue of what evidence should be permitted under this limited standard of review.

This Court has not been compelled to address the issue because the Circuit Courts of Appeal have not struggled to any great degree with this question. Each and every Circuit Court of Appeals who has been presented with the issue of whether or not to permit post-hoc rationalization of benefit denials has concluded that this is impermissible under the arbitrary and capricious standard of review. Simply put the courts have rejected any theory presented by the plaintiff or any defense which have been crafted after litigation has begun, attorneys have been consulted and deficiencies in the decision have been identified. *See University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839 (6th Cir. 2000) The Third Circuit Court of Appeals in Foley however has created a needless conflict with all other circuit courts of appeal by permitting the Defendants to develop novel

theories of denial which routinely changed throughout the course of the litigation in the lower courts. Incredibly the Court permits post hoc rationalization even though four days prior to oral argument in this case it stated in dicta that it would adopt the rational of all the other circuits on this issue. *See Skretvedt v. E.I. Dupont*, 268 F.3d 167 (3d Cir. 2001) Thus by ascribing a rationale for permissible disparate treatment that was not communicated to Foley and was specifically and unequivocally rejected by the Trustees, the Panel's decision sets up a needless conflict with all the other Circuit Courts who have considered this question

Each and every circuit court of appeals who has been presented with the question of what rationales the court may consider in a § 502(a)(1)(B) ERISA claim for benefits under the arbitrary and capricious standard of review has concluded that a reviewing court cannot offer a rationale for denial that was not communicated to the participant. The Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeal are equal in their unanimity that a reviewing court can not explore a rationale for denial that the Trustees themselves did not utilize or communicate to a participant. The Fifth and Seventh Circuit Courts of Appeals offer a modified response to a Plan's attempts to offer new rationale by permitting review of the new arguments but only after forfeiting the arbitrary and capricious standard of review.

In *Sheldon v. Barre Belt Granite*, 25 F.3d 74 (2d Cir. 1994) the Second Circuit held that a district court cannot affirm a denial of benefits by ascribing to the plan a reason for denial other than the one proffered to the claimant. In *Doe v. Group Hospitalization*, 3 F.3d 80 (4th Cir. 1993) the Fourth Circuit would not permit the plan to ascribe reasons for denial not communicated to the participant. In *University*

Hospitals of Cleveland v. Emerson Electric Co., 202 F.3d 839 (6th Cir. 2000) the Sixth Circuit refused to permit post hoc rationalization of a decision to deny benefits. In *Marolt v. Alliant Techsystems*, Inc. 146 F.3d 617 (8th Cir. 1998) the Eighth Circuit rejected plan counsel's argument of a reasonable interpretation of the plan because the plan committee did not rely on it when denying benefits. In *Dishman v. UNUM Life Ins. Co. of America*, 250 F.3d 1272 (9th Cir. 2001) the Ninth Circuit held the fact that UNUM may be able post hoc to offer a legally plausible justification for its termination of benefits is irrelevant. In *Sandoval v. Aetna Life*, 967 F.2d 377 (10th Cir. 1992) the Tenth Circuit found that a curtain falls once administrative review is complete and thus post hoc justification is inappropriate.

On October 5, 2001, four days before oral argument in Foley, the Third Circuit Court of Appeals stated that it would follow the lead of the other circuit courts of appeal on this issue. In *Skretvedt v. E.I. Dupont*, 268 F.3d 167 (3d Cir. 2001) the Court reversed a grant of summary judgment for the plan because the decision to deny benefits was arbitrary and capricious and thus did not have to reach the issue of post hoc rationalization. The Court indicated in Note 8 however that if in the future it were presented with this issue it would stand by the precedent established in the other Circuit Courts of appeal. The Court specifically agreed with the policy considerations of the Sixth Circuit in *Emerson Electric* because:

> To depart from the administrative record in this fashion would, in our view, invite more terse and conclusory decisions from plan administrators, leaving room for them — or, worse yet, federal

> judges — to brainstorm and invent various proposed "rational bases" when their decisions are challenged in ensuing litigation. id. *Skretvedt* at n. 8 quoting *University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839, 848 n. 7 (6th Cir. 2000)

Skretvedt, was not discussed nor even mentioned in the Panel decision.[1] Although the Third Circuit has indicated very strongly that it will not permit such post hoc rationalization it has simultaneously and contemporaneously permitted it in the instant case.

The rationale behind the refusal to consider reasons for denial not communicated to the plan participant is rooted in the judicially created doctrine of exhaustion of plan remedies. The Panel's decision in this case fundamentally upsets this well accepted doctrine. Although ERISA has no statutory requirement that a claimant must exhaust administrative remedies this requirement has been uniformly enforced. The Courts have imposed the exhaustion of remedies requirement to (1) uphold Congress's desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action is made under the arbitrary and capricious standard, not de novo. See, for example, *Denton*

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1. The Fifth Circuit and Seventh Circuit Court of Appeals also find post hoc rationalization to be problematic. *See Schadler v. Anthem Life Insurance*, 147 F.3d 388, 398 (5th Cir. 1998) and *Matuszak v. Torrington Co.*, 967 F.2d 320, 322-323 (7th Cir. 1991) These Circuits however offer the remedy of either remanding to the Trustees for further consideration or permitting the District Court to review the new rationale under de novo review.

v. First Natl. Bank, 765 F.2d 1295, 1300 (5th Cir. 1985) or *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980) Thus a delicate balance has been crafted by the courts over the last twenty plus years that ensures a very limited role for the federal courts in ERISA § 502(a)(1)(B) claims provided that the parties avail themselves of the administrative review process and the Trustees fully communicate their decisions to the participants.

The dual principles of exhaustion of plan remedies and the universal refusal to consider post hoc rationalization are therefore not mutually exclusive and are rather entirely dependent on one another. The goal behind ERISA's claims procedures was to create incentive to develop a "body of precedent" to ensure consistency in plan administration. *See Richardson v. Central States Pension Fund*, 645 F.2d 660 (8th Cir. 1981) It is axiomatic then that post hoc rationale could only mean that plan trustees have not developed this body of precedent a prevents a participant from demonstrating conformity with the criteria being utilized by the administrator. Ultimately a post hoc attempt to furnish a rationale for a denial . . . to avoid reversal on appeal, and thus meaningful review, diminishes the integrity of the Fund and its administrators. *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984)

The Panel's decision in the Third Circuit in this case upsets this balance and if allowed to stand would not only set up a needless conflict with all other circuits but would also more fundamentally eviscerate the administrative review process. If the decision reached and the means by which the Trustees arrived at that decision was not binding on the Plan when it came time for judicial review a participant would have no incentive to fully and fairly communicate with the

Trustees and in fact would lead to gamesmanship by potentially withholding the most important evidence until it was time for court. The courts too would likely become even further burdened through the unnecessary and burdensome process of reviewing any and all novel theories of denial that a creative attorney can craft for trial. Reviewing all of these new theories also would of necessity preclude issuing decisions on summary judgment thus requiring the additional and greater burden of a full trial.

Finally it must be pointed out that permissible disparate treatment by mere dint of the fact that Foley formerly served as a Trustee, without more, sets an extremely dangerous precedent that will effect in excess of 102,000 current trustees sitting on jointly administered trust funds and thus presents an important question for this Court. According to the Department of Labor there are approximately 17,000 jointly administered pension plans in the United States which are typically comprised of three employee trustees and three management trustees. Individual participants serve as trustees on these funds on a voluntary basis and without compensation which makes filling the ranks difficult at best. If this decision of the Third Circuit is to stand the task of filling these positions will become even more difficult because a reasonable person would never want to jeopardize his or her pension because they merely served as a trustee.

CONCLUSION

Edward J. Foley, Sr., respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED NOVEMBER 8, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 00-2767 and 00-4427

EDWARD J. FOLEY, SR.,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NIELSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY J. BRADLEY, in his capacity as a TRUSTEE; FRED J. COMPTON

International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, in his capacity as a Trustee, Edward Nielson, in his capacity as a Trustee, Joseph Agresti, in his capacity as a Trustee, Thomas J. Reilly, Jr., in his capacity as a Trustee, Dennis Link, in his capacity as a Trustee, William C. Rhodes, in his capacity as a Trustee,

Appendix A

Roy Dantz, in his capacity as a Former Trustee,
and Larry Bradley, in his capacity as a Former Trustee
(Collectively the "Defendants"),

Appellants in No. 00-2767

EDWARD J. FOLEY, SR.,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98 OF AMERICA; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NIELSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LAWRENCE J. BRADLEY, in his capacity as a TRUSTEE,

Appellants in No. 00-4427

and FRED COMPTON

Appendix A

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-906)
District Judge: Honorable Lowell A. Reed, Jr.

Argued October 9, 2001
Before: SCIRICA, GREENBERG, and COWEN,
Circuit Judges

(Filed: November 8, 2001)

* * *

GREENBERG, Circuit Judge.

This matter comes on before this court on appeal from an order of the district court entering judgment in favor of appellee Edward J. Foley, Sr., and against the International Brotherhood of Electrical Workers Local Union 98 Pension Fund (the "Pension Fund" or the "Fund").[1] Foley claims that the Pension Fund's Board of Trustees ("Trustees") improperly declined to grant him an exception to the pension Plan's service eligibility provisions that would have permitted him to receive a higher level of benefits than that to which he

1. There is some question as to which of the defendants the district court entered judgment against. While the court apparently intended to enter judgment only against the Fund, and the district court docket reflects this disposition, the individual defendants nevertheless have appealed. Inasmuch as we conclude that Foley was not entitled to a judgment against any of the defendants, the question is of no practical significance. However, as a matter of convenience, we will treat all the individual defendants except Fred Compton as appellants, as they in fact appealed.

otherwise was entitled. Following a bench trial, the district court concluded that the Trustees arbitrarily and capriciously declined to apply the exception to Foley in the manner they had applied it to other employees seeking its benefit. Thus, it entered judgment in his favor on August 29, 2000. Appellants assert that the district court, when reviewing the Trustees' decision, erred in its application of the arbitrary and capricious standard, as Foley was not similarly situated to other employees to whom the Trustees had applied the exception. Appellants also appeal the district court's subsequent award of attorneys' fees to Foley by order of December 8, 2000. For the reasons set forth below, we will reverse the district court's judgment on the merits and, accordingly, we also will reverse the award of attorneys' fees.

I. BACKGROUND

Foley is the former President of the International Brotherhood of Electrical Workers Local 98 (hereinafter "the Union") and a former Trustee of the Union's Pension Fund. He worked in covered employment for Fund pension purposes, *i.e.*, employment in the electrical industry, from 1959 until his employer laid him off in 1971. Then, from 1972 through 1980, Foley worked in his family's tire business, returning to employment in the electrical industry in 1981. Following his return to the electrical industry, Foley was elected the Union's President and he served as a Trustee of the Pension Fund from 1987 through July 1996. In July 1996, Foley retired and sought pension benefits.

Under the Plan provisions, Foley forfeited all credited service earned prior to his return to work in 1981 because of a break-in-service provision which provided, in the years

applicable to Foley, that accrued pension credits lapsed when a Plan participant did not work 600 hours in covered employment for a consecutive two-year period. There is, however, an exception to the break-in-service provision, known as the available-for-work exception, wherein the Plan provides that an employee shall not forfeit credited service if he was continuously available for work within the jurisdiction of the Union and unable to obtain covered employment.[2] Based on this exception, in 1988, shortly after Foley began his tenure as Trustee, the Trustees agreed to excuse his break-in-service pursuant to their understanding that work had not been available to him in covered employment from 1972 to 1980.

On October 28, 1994, however, Fred Compton, a former Union president and Trustee, sent Laurance Baccini, counsel to the Pension Fund, a letter stating that the 1988 decision was incorrect because the Trustees at that time based their decision on fabricated information improperly skewed in Foley's favor. Upon receipt of Compton's letter, the Trustees appointed a subcommittee to investigate Compton's

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2. The relevant Plan provision states:

Notwithstanding anything to the contrary in paragraph (a) and (b), an employee shall not have forfeited any of his Credited Service (past or future) or the right to any death benefit regardless of his number of years of credited service if:

(1) he was continuously available for work within the jurisdiction of the Union and was unable to obtain covered employment.

Article I, Definitions, Section C "Break in Service" (c)(i).

allegations. Then, in February 1995, based on the subcommittee's recommendations, the Trustees reversed the 1988 decision because they concluded that there was insufficient evidence to substantiate Foley's claim that work was unavailable and that he was available for covered employment in the 1972-1974 period.

In July 1996, Foley applied for pension benefits but, based upon their 1995 decision, the Trustees denied his application insofar as it sought credits for the period between 1959-1971. Foley appealed but was not successful as the Trustees determined that he still had not presented sufficient information to establish his entitlement to credit for the disputed years of credited service.

On February 23, 1998, Foley commenced this action under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), in particular 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3), which action, as subsequently amended, named the Fund, the Union, the Trustees, and various Union officers as defendants. In his complaint Foley asserted that the Trustees improperly applied a more demanding evidentiary standard to him than to other employees who had been granted an exception to the break-in-service provision notwithstanding a provision in the Plan that all "interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated." In addition to his ERISA claims, Foley also asserted claims under the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401 *et seq.*, ("LMRDA"), and the Internal Revenue Code, 26 U.S.C. §§ 411 and 412. Following the parties' cross-motions for summary judgment, the district court dismissed all but Foley's ERISA claims. *See Foley v.*

IBEW Local Union 98 Pension Fund, 91 F. Supp. 2d 797 (E.D. Pa. 2000).[3] We make no further reference to the dismissed claims, as Foley has not cross-appealed from their dismissal and has not asserted that we should affirm on the basis of these claims.

After a bench trial in August 2000, the district court found that the Trustees arbitrarily and capriciously acted contrary to the terms of the Plan when they denied Foley credit for time during his employment in the electrical industry prior to his 1971 layoff. *See Foley v. IBEW Local Union 98 Pension Fund*, 112 F. Supp. 2d 411, 416-17 (E.D. Pa. 2000) ("*Foley*"). On August 29, 2000, the court entered judgment against appellants, and on December 8, 2000, entered an order granting Foley's motion for attorneys' fees. *See Foley v. IBEW Local Union 98 Pension Fund*, No. Civ. A. 98-906, 2000 WL 1801273 (E.D. Pa. Dec. 7, 2000). Appellants have timely appealed from the judgment and order.[4]

II. STANDARD OF REVIEW

We reverse factual conclusions of the district court only if they are clearly erroneous, *see* Fed. R. Civ. P. 52(a), but exercise "plenary review over the trial court's choice and interpretation of legal precepts and its application of those

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3. Foley included Compton as a defendant but the parties later dismissed the action against him by stipulation. He is not a party on this appeal.

4. The district court had jurisdiction over this matter pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331 and we have jurisdiction under 28 U.S.C. § 1291.

precepts to the historical facts." *Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am.*, 222 F.3d 123, 129 (3d Cir. 2000) (citation and internal quotation marks omitted). Where, as here, the plan administrator has discretion to interpret the Plan and the authority to determine eligibility, we review a denial of benefits under an "arbitrary and capricious" standard. *Id.* Under this standard:

> a plan administrator's decision will be overturned only if it is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan. A court is not free to substitute its own judgment for that of the defendants in determining eligibility for plan benefits.

Orvosh, 222 F.3d at 129 (internal quotations and citations omitted).[5] Further, "the district court cannot, by couching a legal conclusion as a finding of fact, prevent appellate review of legal errors." *Louis W. Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) (citation and internal quotation marks omitted).

III. DISCUSSION

The Trustees denied Foley credit for the disputed years of service because the subcommittee's investigation demonstrated that work had been plentiful between 1972 and 1974, but that Foley was unavailable for work during that

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5. Foley unsuccessfully argued in the district court that the court should review the Trustees' decision on a *de novo* basis but he does not make that contention on this appeal.

period due to his employment in the family tire business. The Trustees also found that Foley failed to produce any evidence supporting his claim.

Under the "arbitrary and capricious" standard of review, the district court was bound to affirm this decision if it was not contrary to the Plan's terms and was rationally related to a legitimate Plan purpose. *See Orvosh*, 222 F.3d at 129-31. The district court determined that although the Trustees believed in good faith that they were treating Foley the same as any other applicant seeking the benefit of the break-in-service exception, they actually treated him differently from other employees similarly situated in that they arbitrarily and capriciously subjected his application to a more demanding evidentiary standard and a stricter level of scrutiny than those of other employees. *See Foley*, 112 F. Supp. 2d at 416. A district court, however, may not substitute its judgment for that of a plan's trustees in determining a claimant's eligibility for benefits, and, as we discuss below, the record demonstrates that the Trustees here did not arbitrarily and capriciously treat Foley as not being similarly situated to other employees to whom the exception to the break-in-service rule had been applied.

The record shows that during a Trustees' meeting in 1979, they determined that Foley forfeited the credits he earned from 1959-1971 as he had a two-year break in service as of 1973. In 1984, when, after resuming employment in the electrical industry, Foley inquired as to the status of those credits, Compton informed him that they had been forfeited and that it was "too late" to save them.

Appendix A

In 1988, six months after Foley was elected President of the Union, he appointed himself, Paul Gilmore, and James Mackin to three of the six positions on the Fund's Board of Trustees. Shortly thereafter, the Board of Trustees granted Foley credits for the years 1959-1971, reversing its prior forfeiture of his credits even though he had not applied formally for their reinstatement. Indeed, Foley did not present documentary evidence to support the award of credits at the time he was awarded the credits. Instead, Mackin and Gilmore spoke on Foley's behalf, and the Trustees appear to have accepted their statements as true. The record shows, however, that Mackin and Gilmore did not have first hand knowledge of the germane facts as they had not been employed full time in the electrical industry during the 1972 to 1974 period.

In October 1994, however, the Trustees received Compton's letter, "seriously question[ing]" the 1988 decision and stating that "the [1988] pension trustees may have been either misled or misinformed" when they reinstated Foley's credits. Confronted with this formal written challenge, the Trustees determined that they were obliged to review the facts and, accordingly, created the subcommittee to investigate the issues Compton raised in his letter.

The subcommittee rendered its report in late 1994 or early 1995. It found that work opportunities were "plentiful" from 1971 through 1974 and, according to the record available to it, the hours electricians worked during that period evidenced "full employment, a few visiting brothers working and a decent amount of overtime." The subcommittee also determined that the Trustees in 1988 primarily relied on Gilmore's statement that Foley was available for work but Gilmore admitted to the subcommittee that he knew only of Foley's availability

after 1975. The subcommittee interviewed Foley, who stated that he went into the family business in 1972 and periodically checked to see if electrical work was available.

We recognize that the subcommittee noted that the lack of evidence supporting Foley's alleged availability for work in the electrical industry and inability to find work was not "unique" and that the "available for work-no work available" exception had been applied liberally. In fact, the subcommittee's report included a list showing each case in which the exception had been applied since 1980. Consequently, the subcommittee recommended that the Trustees construe the exception more strictly than they had in the past and that if they did so in Foley's case, they also should "examine" the included list, making "appropriate adjustments." *Id.* at 254-255.[6]

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6. According to the list, in addition to Foley, 20 other employees applied for the benefit of the exception, only one unsuccessfully. Eight who were successful had signed the Union's "out-of-work" book signaling their availability for work. In three cases, the Trustees testified as to having first hand knowledge as to each employee's availability for work and in three other cases the employees had constant contact with the Union, and one submitted a letter detailing his work history.

The district court found these distinctions from Foley's case "not meaningful or persuasive." *Foley*, 112 F. Supp. 2d at 414 n. 2. It pointed out that during the period at issue, 1972-1974, a time that the Trustees found that work opportunities were plentiful, nine employees had been granted the "available for work-work not available" exception. *Id.*

(Cont'd)

Appendix A

In February 1995, following their review of the sub-committee's report, the Trustees unanimously voted to remove the credited service from Foley's pension record but advised him that at any time he could submit a request for reconsideration attaching relevant documentation. The Trustees also resolved to reinvestigate all other individuals to whom the "available for work-no work available" exception had been applied. *See Foley*, 112 F. Supp. 2d at 413.

In July 1996, when Foley applied for benefits, he did not submit additional information supporting a credit for service from 1959 to 1971. Accordingly, the Trustees awarded Foley pension benefits taking into account his break in service. Foley appealed the decision, but the Trustees concluded that they had "insufficient evidence as to the unavailability of work and Mr. Foley's inability to obtain covered employment during the Plan years 1972, 1973 and 1974."

The district court found that the Trustees acted in good faith and believed they did not treat Foley differently than other employees. *Foley*, 112 F. Supp. 2d at 415. However, the court determined that the Trustees actually held Foley to a stricter standard "than any other individual in like circumstances," *id.*, arbitrarily and capriciously violating their duty to interpret the Plan and apply decisions "in a uniform manner to all Employees similarly situated." *Id.* at 416 (citation omitted).

(Cont'd)

However, of these nine, only two met the exception during 1973, and the remaining seven could not find work from 1974-1975. Most of those who could not find work in 1974-1975 were out-of-town workers who signed the out-of-work book. Of the two that met the exception in 1973, the Trustees had first hand knowledge of both employees' record.

Appendix A

The district court made much of the fact that the Trustees appointed the subcommittee to investigate the circumstances under which Foley had been granted the exception in 1988, yet failed to form a subcommittee to examine "any other plan participant's pension application." *Foley*, 112 F. Supp. 2d at 415. As the district court recognized, however, the allegations of impropriety that Compton raised in his letter "justified a review of plaintiff's claim to determine whether there was any impropriety." *Id.* at 414 n. 2. Thus, given the allegations of impropriety in the Compton letter, and in light of their fiduciary duties to the Fund, the Trustees reasonably and appropriately appointed the subcommittee in Foley's case.

The district court next took issue with the actions the Trustees took upon receipt of the subcommittee's report. *See id.* The court seems to have been of the view that because the investigation yielded "no evidence of wrongdoing or deceit," the Trustees were bound to grant Foley's application for benefits as they had with "a number of individuals who sought refuge under the break-in-service exception . . . who, like Foley, produced a minuscule amount of evidence." *Id.* The court also seemed frustrated with the fact that the Trustees had not conducted an investigation with respect to the other employees who were granted the benefit of the exception. *Id.* at 415. These cases differed from Foley's, however, in that these employees' eligibility for the exception never was challenged. Further, the subcommittee did not uncover any evidence suggesting that any of them acquired pension credits through improper means.[7]

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7. Apparently, the Trustees referred the matter to the Fund professionals for follow-up. Several individuals who were granted the benefit of the exception now are deceased. *See* Appellants' Br. at 34.

In essence, the court held that because Foley was "similarly situated" to other employees who had benefitted from a liberal interpretation of the available-for-work exception, the Trustees' failure to award him the break-in service credits was "arbitrary and capricious." *Foley*, 112 F. Supp. 2d at 416. The premise of the court's decision was, however, erroneous as Foley was not similarly situated to rank and file Union members who had been granted the benefit of the exception. Rather, he was a Trustee when he sought to have service credits added to his pension record, and he appointed the Trustees who spoke on his behalf and apparently voted to grant him the benefit of the exception. Moreover, Foley's case was the only one under the available-for-work exception where issues of impropriety were raised, and his case was the only one in which the employee's entitlement to benefits under the exception was challenged. Furthermore, upon review of the subcommittee's report, the Trustees recognized that they did not have evidence to support the application of the exception to Foley.

It is also significant that at a time that he should have been "continuously available for work" in order for his break in service to be excused, Foley was engaged in the family tire business and thus had an incentive not to work in the electrical industry. When the district court made its determination that the Trustees acted arbitrarily and capriciously, it should have recognized that this circumstance distinguished Foley's case from those of other supposedly "similarly situated" employees who were granted the benefit of the exception, as Foley made no showing that they had incentives equivalent to his to eschew employment in the electrical industry. In the circumstances, it cannot reasonably

be held that the Trustees arbitrarily and capriciously treated Foley differently from other employees similarly situated, and thus the district court erred in reaching its result.

We emphasize that in focusing on the fact that credit under the available-for-work exception had been granted liberally in the past rather than examining whether the Trustees' decision was contrary to Plan language or whether it was rationally related to a legitimate Plan purpose, the district court did not properly credit significant evidence. This evidence included the subcommittee's finding that work was plentiful from 1972-1974, the Trustees' own recollections and understanding regarding the availability of work during that time, Gilmore's admission to the subcommittee of his lack of knowledge of the germane facts, Foley's failure to present evidence, and the circumstances in which Foley was originally granted the exception. The court, however, should have relied on this evidence as it was not free to substitute its judgment for that of the Plan administrators. *See Orvosh*, 222 F.3d at 129.

Moreover, the district court's holding binds the Trustees to a result that was a consequence of poor administrative practices, that the Trustees later corrected. In effect, the district court's decision improperly "straitjackets" the Trustees into granting benefits simply because of their past practices. *See Oster v. Barco of Cal. Employees' Ret. Plan*, 869 F.2d 1215, 1219 (9th Cir. 1988) (holding that prior record of granting requests is insufficient to establish that committee denied request in arbitrary and capricious manner and stating "[t]o hold otherwise would impair the flexibility necessary for proper financial management of such plans, a goal of

Congress in holding ERISA fiduciaries to the 'prudent man' standard") (citation and internal quotation marks omitted). *See also Nazay v. Miller*, 949 F.2d 1323, 1336 (3d Cir. 1991) (plan administrator's decision not to waive requirement "was neither arbitrary nor capricious and did not constitute an abuse of discretion" where plan administrator waived requirement on 14 previous occasions). We are particularly troubled by the fact that the district court effectively read the break-in-service forfeiture provision out of the Plan, as under the court's conclusions it is difficult to see how it ever could be applied in the face of an employee's claim that he is entitled to the benefit of the exception.[8]

The district court's opinion also is problematical for another quite fundamental reason. While we know that the break-in-service exception was excused in 20 other cases in which employees claimed its benefit, the district court had no way of knowing the number of situations in which employees lost credits by reason of a break in employment during a consecutive two-year period but did not seek the benefit of the exception. Certainly if there were such employees, they were treated the same as rather than differently from Foley.[9] But the district court did not consider this possibility.

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8. Foley argues that the Trustees did not raise a "straightjackets" argument in the district court. We are satisfied, however, that they sufficiently made the contention to preserve it for this appeal.

9. The subcommittee's report said that "[g]enerally, the available for work-no work available exception has been applied liberally in almost all cases in which it has been invoked." The report, however,

(Cont'd)

In summary, we conclude that in appointing a subcommittee to investigate the claims against Foley, the Trustees acted quite responsibly and consistently with their obligations as fiduciaries. Moreover, inasmuch as the Trustees' decision to deny the disputed benefits was not contrary to the Plan's terms and was rationally related to a legitimate Plan purpose, the district court erred in determining that the Trustees acted in an arbitrary and capricious manner. Furthermore, because Foley was not

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(Cont'd)
did not advise the Trustees of the number of cases in which the break-in-service forfeiture provision had been applied without the employee invoking the exception. Moreover, the parties' briefs do not suggest that there was any evidence on this point in the district court. In this regard, we point out that Foley had the burden of proof as he brought the action and had to demonstrate that the Trustees acted arbitrarily and capriciously. While we cannot be certain of the number of employees who did not receive the benefit of the break-in-service exception following an interruption of employment and forfeiture of credits, it may have been substantial. The list attached to the subcommittee's report reveals that over a period of about 15 years from 1980 until the subcommittee made its report, only 21 employees sought the benefit of the exception. Yet, according to the district court, the Fund had more than $130,000,000 "in its coffers" when Foley applied for fees. *See Foley v. IBEW Local Union 98 Pension Fund*, 2000 WL 1801273, at *4. A reasonable inference can be drawn from the size of the Fund that it must have provided for benefits for many employees and thus it well may be that many have lost pension credits by reason of breaks in service. Yet inasmuch as we only can speculate on this fundamental point, we do not understand how we can uphold the decision of the district court that the Trustees acted arbitrarily and capriciously. We add, however, that even without considering the possibility that some employees did not obtain the benefit of the break-in-service exception, our result would be the same as that we reach.

similarly situated to the other employees who were granted the benefit of the exception, the Trustees were not bound to grant him the benefit of the exception merely because they had applied it in other cases. Accordingly, we will reverse the judgment of the district court.[10]

IV. ATTORNEYS' FEES

Finally, we come to the question of the attorneys' fees which ERISA permits when a participant, beneficiary or fiduciary succeeds on any significant issue in the litigation which achieves some of the benefit sought from the suit. *See* 29 U.S.C. § 1132(g)(1). In light of our conclusions, it is clear that Foley has not prevailed on a significant issue in the litigation and thus, we will therefore reverse the district court's award of attorney fees. *See Hensley v. Northwest Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 1002-03 (9th Cir. 2001).[11]

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10. The appellants contend that the district court erred in entering judgment against Scott Ernsberger, whom they describe as the Fund's "third party contract administrator," by reason of circumstances particular to him, and that the court also erred in calculating damages. In view of our result, we do not reach these issues as we are reversing the judgment as to all appellants, including Ernsberger on common grounds and directing judgment to be entered in their favor, and because there will not be any damages to calculate.

11. Certain of the defendants unsuccessfully sought attorneys' fees in the district court but inasmuch as they are not at this time seeking these fees we do not review the district court's order denying their application.

V. CONCLUSION

For the foregoing reasons, we will reverse the district court's judgment of August 29, 2000, and its order of December 8, 2000, and will remand the matter to the district court to enter judgment for the defendants.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED MARCH 29, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 98-906

EDWARD J. FOLEY, SR.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,

Defendants.

Reed, S.J. March 29, 2000.

MEMORANDUM

Plaintiff was denied a portion of his accrued pension benefits and now brings claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. ("ERISA"), the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401, et. seq. ("LMRDA"), and the Internal Revenue Code, 26 U.S.C. §§ 411 and 412. Now before this Court are the cross-motions of plaintiff

Appendix B

Edward J. Foley, Sr. (Document No. 46), and defendants International Brotherhood of Electrical Workers Local Union 98 Pension Fund, et. al., (Document Nos. 44 and 45).

I. BACKGROUND

Edward Foley, Sr., was a union member who contributed to the International Brotherhood of Electrical Workers Local Union No. 98 Pension Fund from 1959-1971. He earned 12.5 years of pension credits during that time. In 1971, he was fired from employment covered under the plan (employment in the electrical industry), and from 1971 to 1981, Foley did not work in covered employment.[1] He claims that he continued to seek employment in the electrical industry during the 1971-81 by contacting union offices and members for job references. While Foley was not involved in covered employment and thus earned no pension credits from 1971-81, apparently he remained active in union affairs, voted in union elections, and taught courses for union members during that time. Foley returned to covered employment in 1981 and eventually became president of the union and a trustee of the pension fund. He retired and sought pension benefits in 1996.

The controversy in this case surrounds plaintiff's 1971-81 hiatus and its effect on the benefits plaintiff had accrued prior to it. The International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan ("plan") contains a "break in service" provision under which accrued pension credits lapse when an individual fails to work 600 hours in covered employment for a consecutive two-year period.

1. From 1971-81, Foley was employed by his father-in-law's tire business, sold cars, etc.

Appendix B

(Plaintiff's Motion for Partial Summary Judgment, Ex. A, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan, at 3) ("break-in-service provision"). It is undisputed that Foley failed to work for 600 hours in covered employment for more than two consecutive years during the 1971-81 period. However, Foley believed he qualified for an exception to the break-in-service provision, under which an individual who suffered a break in service may nevertheless collect pension credits accrued prior to the break in service if s/he can show that s/he was "continuously available for work within the jurisdiction of the Union and was unable to obtain covered employment." (Plaintiff's Motion for Partial Summary Judgment, Exh. A, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan, at 3) ("available-for-work exception").

In 1988, Foley raised his eligibility for the available-for-work exception to the trustees of the pension fund ("trustees"). The trustees passed a resolution to "change the pension records of Edward J. Foley . . . to reflect that Mr. Foley did not incur a break-in-service because he met the requirements of the Pension Plan [exception] . . . which provides a grace period and obviates the Plan's break-in-service provision." (Plaintiff's Motion for Partial Summary Judgment, Exh. B. Local 98 Pension Trust Fund, Minutes of the Meeting, Dec. 7, 1988, at 13). The matter lay dormant until 1995, when union member Fred Compton,[2] who plaintiff claims bore a grudge against plaintiff,[3] began raising

2. Compton was added as a defendant in this case by plaintiff's Amended Complaint (Document No. 2), and dismissed pursuant to a stipulation (Document No. 47).

3. Plaintiff had defeated the Compton in a prior election for president of the local union.

questions about whether plaintiff was entitled to pension benefits for the years before his break in service. Compton submitted a letter to the pension fund trustees alleging that plaintiff may have misled them in 1988 about his availability for work during his break in service. The trustees reopened the matter and conducted an investigation into the 1988 vote, ultimately concluding that, while plaintiff had not committed misconduct and had produced sufficient evidence to qualify for the available-for-work exception for the most of the years during his break in service (1975-81), he had not proved that he was available for, but unable to, obtain covered work during the years 1972-74. Thus, the pension plan reversed its 1988 determination and concluded that plaintiff did not qualify for the available-for-work exception and was not entitled to credits accrued from 1959-71. (Plaintiff's Motion for Partial Summary Judgment, Exh. G, Letter from Trust Fund Counsel Laurance E. Baccini, Feb. 23, 1995).

The matter again entered a period of dormancy until plaintiff retired and actually applied for pension benefits in July 26, 1996. While his application was granted for benefits accrued from 1981 to 1996, his application for credits accrued during the years 1959-71 was denied in 1996, as were his appeals. Plaintiff then brought this action.

Plaintiff asserts claims under ERISA for recovery of benefits 29 U.S.C. § 1132(a)(1)(B), and equitable relief under 29 U.S.C. § 1132(a)(3), against the International Brotherhood of Electrical Workers Local Union 98 Pension Fund ("Pension Fund") and Scott Ernsberger, and John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilley, Jr., Dennis Link, William C. Rhodes, Roy Dantz,

and Larry Bradley in their capacities as trustees (collectively, the "Plan Defendants"). He also names as defendants the International Brotherhood of Electrical Workers Local Union 98 ("Union") Dougherty and Nielson in their capacities as union officers (collectively, the "Union Defendants"). Plaintiff also asserts claims under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 412 ("LMRDA"). The Plan Defendants assert counterclaims against plaintiff for breach of fiduciary duty under ERISA.

II. ANALYSIS

The Union Defendants (Document No. 44) and the Plan Defendants (Document No. 45) have each filed motions for summary judgment as to all of plaintiff's claims. Plaintiff has filed a motion for partial summary judgment on his ERISA claims (Document No. 46). The Union Defendants' motion will be granted in full; the Plan Defendants' motion will be granted in part and denied in part; and plaintiff's motion will be granted in part and denied in part.

A. Summary Judgment Standard

According to Rule 56(c) of the Federal Rules of Civil Procedure, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," then a motion for summary judgment must be granted. The question before the Court at the summary judgment stage is "whether the evidence presents a sufficient disagreement to require submission to a

jury or whether it is so one-sided that one party must prevail as a matter of law." *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2511 (1986). The Court's role at summary judgment is not to weigh the evidence, but to determine whether there is a genuine issue for trial; that is, an issue upon which a reasonable jury could return a verdict in the non-moving party's favor. *See id.* at 249, 106 S. Ct. at 2511.

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id. at* 324, 106 S. Ct. at 2553.

In deciding whether there is a disputed issue of material fact, the "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962)). On cross-motions for summary judgment, the court must determine separately on each party's motion whether judgment may be entered in accordance with the summary judgment standard.

Appendix B

See Sobczak v. JC Penny Life Ins. Co., No. 96-3924, 1997 U.S. Dist. LEXIS 1801 (E.D. Pa. Feb. 14, 1997), *aff'd*, 129 F.3d 1256 (3d Cir. 1997) (citing 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720, at 23-25 (2d ed.1983)).

B. ERISA

Plaintiff asserts claims for recovery of benefits under § 1132(a)(1)(B) and for injunctive relief under § 1132(a)(3). In their motion for summary judgment, defendants assert that plaintiff's claims are procedurally barred and that they fail on the merits.

1. *Procedural Objections*

a. Timeliness

Defendants first assert that plaintiff did not appeal the trustees' denial of his benefits in a timely fashion and thus failed to exhaust his administrative remedies. Under the plan, defendants argue, Foley had 60 days to appeal the decision of the trustees to deny him credits accrued from 1959-71, and his appeal was received four days after the expiration of the 60-day period. Having failed to exhaust administrative remedies as required under ERISA, defendants contend, plaintiff cannot proceed to the merits of his claim.

The facts regarding the timeliness issue are somewhat convoluted. Plaintiff submitted his application for pension benefits, including credits accrued from 1959-71, on July 26, 1996. (Plaintiff's Motion for Partial Summary

Judgment, Exh. L, Pension Application of Edward J. Foley). On September 4, 1996, the pension fund notified him that he would receive only the pension credits accrued from 1981-96, and would not receive credits accrued prior to his break in service. (Plaintiff's Motion for Partial Summary Judgment, Exh. M, Letter from Benefits Administrator, Sept. 4, 1996). On November 6, 1996, plaintiff filed what he believed was an appeal of the decision to deny him credits accrued from 1959-71 due to the break-in-service provision. (Plaintiff's Motion for Partial Summary Judgment, Exh. N, Letter from Edward J. Foley, Nov. 6, 1996). In a letter dated December 12, 1996, plaintiff was notified that his claim for pension benefits for the years 1959-71 was denied, and told he could appeal the denial. (Plaintiff's Motion for Partial Summary Judgment, Exh. Q, Letter from Scott A. Ernsberger, Plan Administrator, Dec. 12, 1996).

On February 5, 1997, plaintiff wrote a letter to the plan administrator, which plaintiff considered a second appeal. (Plaintiff's Motion for Partial Summary Judgment, Exh. P, Letter from Edward J. Foley, Feb. 5, 1997). On April 16, the pension fund administrators sent plaintiff a detailed letter setting forth the status of plaintiff's claim and again afforded plaintiff 60 days to file an appeal. (Plaintiff's Motion for Partial Summary Judgment, Exh. R, Apr. 16, 1997). Plaintiff received that letter on April 21. Plaintiff then submitted an appeal, including a memorandum and affidavits, which was received by the plan administrators on June 24, 1997, 4 days after the 60-day period set forth in the April 16 letter. (Plaintiff's Motion for Partial Summary Judgment, Exh. S, Petition Appeal of Edward J. Foley, June 23, 1997).

Appendix B

Plaintiff argues that he appealed the denial of benefits twice in a timely fashion (on November 6, 1996, and February 5, 1997) and that the information submitted on June 24, 1997, has no bearing on the timeliness issue. In order to establish whether plaintiff appealed the denial of benefits in a timely fashion, I must first decide when the denial of benefits took place. Plaintiff received three significant letters following his application for benefits in July 1996: the September 4 letter, the December 12 letter, and the April 16 letter. Plaintiff argues that the September 4 and December 12 letters constituted denials, and that he appealed from those letters in a timely fashion. Defendants argue that the April 16 letter was the denial, and that plaintiff's appeal from that letter was untimely.

I am persuaded by plaintiff's argument that the December 12 letter is a denial under the Plan. The Plan does not define "denial," but sets forth these requirements: a denial must be in writing, must set forth the reasons for the denial, and must inform the claimant of his or her right to appeal. (Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. E, at 64). The December 12 letter did all of this, including informing plaintiff of his right to appeal the decision. (Plaintiff's Motion for Partial Summary Judgment, Exh. Q, Letter from Scott A. Ernsberger, Plan Administrator, Dec. 12, 1996).[4] Plaintiff submitted a letter on February 5,

4. Furthermore, the minutes of trustees meeting on November 22, 1996, in which the trustees decided to deny Foley's eligibility for accrued credits, indicates that the trustees believed they might have already denied Foley's claims for his 1959-71 credits in 1995, and that they were, at the November 22 meeting, deciding an appeal. (Plaintiff's Motion for Partial Summary Judgment, Exh. O, Minutes

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1997, within 60 days of the December 12 letter, in which plaintiff stated, "[P]lease consider this letter as my formal written appeal from your December 12, 1996, decision." (Plaintiff's Motion for Partial Summary Judgment, Exh. P, Letter from Edward J. Foley, Feb. 5, 1997). Thus, I conclude that plaintiff's appeal was timely,[5] and that defendants are not entitled to summary judgment on the issue of timeliness.[6]

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of the Special Meeting of the Board of trustees, Nov. 22, 1996). The trustees ultimately directed that a letter be sent denying him benefits so that he could appeal. (*Id.*) It is noted in the minutes of the November 22 meeting, "Subsequent to the meeting, a denial of benefits was sent to Mr. Foley advising him of his right to appeal in accordance with the plan." (*Id.*) Clearly, this refers to the December 12, 1996 letter.

5. Because I conclude that the December 12 letter was a denial under the Plan and the Feb. 5 letter an appeal, defendants' April 16 letter purporting providing plaintiff with 60 days to appeal is at best an extension of time for plaintiff to review the record and supply additional information. Under these circumstances, plaintiff's late submission of that additional information did not constitute an untimely appeal, but an untimely submission of additional information in support of his appeal that has no significance for ERISA's exhaustion requirement.

6. Even if Foley's appeal were untimely, defendants would not prevail, because they have not shown that they were prejudiced by the untimely submission, as they are required to do under the Supreme Court's recent decision in *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 119 S. Ct. 1380 (1999). *See Garcia v. Fortis Benefits Ins. Co.*, No. 99-826, 2000 U.S. Dist. LEXIS 569, at *27-37 (E.D. Pa. Jan. 24, 2000) (in Pennsylvania, ERISA-covered plan required to show it was prejudiced by untimely claim application) (citing *Ward*); *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977)).
(Cont'd)

Appendix B

b. Proper Defendants

Defendants argue that the trustees, the union, and union officials are not proper defendants because the plan is the only proper defendant in a suit for benefits under ERISA. Defendants are incorrect in asserting that only the plan may be sued for benefits under ERISA. The Court of Appeals for the Third Circuit has held that the plan is *not* the only proper party in a suit for benefits under ERISA. *See Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994).[7] *Curcio* holds that fiduciaries of the plan can be held liable for recovery of benefits under an ERISA plan, *id.* at 233-35, and there is ample evidence that the individual trustees in this case are fiduciaries, as they exercise control and

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(Cont'd)

I note my disagreement with the portion of the decision in *Garcia* that holds that *Ward* applies only to denials of benefits that took place after *Ward* was decided. It seems to me that the application of *Ward* to a pre-*Ward* plan decision would only be problematic if *Ward* somehow altered the actual administration of the plan. *Ward* did no such thing; it merely clarifies a plan's trial burden on the timeliness issue and thus affects only the trial and not the responsibilities of a plan administrator. Therefore, a plan defendant cannot argue that it relied upon the pre-*Ward* regime concerning timeliness, and the application of *Ward* to pre-*Ward* plan decisions is not inequitable.

I believe that even if Foley's appeal were untimely, plaintiff would prevail under *Ward* because defendants have not demonstrated that the untimely appeal prejudiced them in any way.

7. A more detailed discussion of fiduciary liability in a suit for recovery of benefits under ERISA is contained in this Court's recent decision in *Vaughn v. Metropolitan Life Ins. Co.*, No. 98-6102, 2000 U.S. Dist. LEXIS 2750 (E.D. Pa. Mar. 13, 2000).

discretion over the administration of the plan as required under *Curcio.* (Plaintiff's Motion for Partial Summary Judgment, Exh. A, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan, at 45).[8] Furthermore, there is specific plan language that states that "[t]he trustees may . . . allocate fiduciary responsibilities and various administrative duties to committees and subcommittees . . ." (Plaintiff's Motion for Partial Summary Judgment, Exh. A, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan, at 46). The trustees must possess fiduciary responsibilities if they are given the power to delegate them, and thus, under *Curcio,* the trustees are fiduciaries that may be held liable for a denial of benefits under ERISA.

The Union Defendants, however, are correct in asserting that they are not proper parties in a suit for recovery of benefits under ERISA. There is no evidence that the union or the individual defendants, in their capacity as union officials, exercised discretion or control over the administration of the plan such that they could be considered fiduciaries of the plan. Because the Union Defendants are not proper parties under ERISA, summary judgment will be granted in favor of the Union Defendants as to all of plaintiff's ERISA claims. *See Payonk v. HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989) (where parties wear "two hats," ERISA attaches only to the extent that they function in their capacity as plan administrators).

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8. This plan language is quoted at length *infra*, text, p. 11.

Appendix B

2. *Merits of Benefits Claim Under 29 U.S.C. § 1132(a)(1)(B)*

While the trustees may be proper defendants under § 1132(a)(1)(B), plaintiff's claim may face perils on the merits, depending on the standard applied by the Court in reviewing the Plan's decision to deny benefits. The Supreme Court has held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 956-57 (1989). Where an administrator has been given discretion, its decisions are reviewed under an "abuse of discretion" or "arbitrary and capricious" standard,[9] and they "will not be disturbed if reasonable." *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 437 (3d Cir. 1997) (quoting *Firestone*, 489 U.S. at 111, 109 S. Ct. at 954).

Defendants contend that this Court should apply the arbitrary and capricious standard to the decision to deny benefits to Foley, because the plan gives the trustees discretionary authority over the administration of the plan. The plan states,

> The trustees shall make such rules and establish such regulations for the administration of the plan

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9. "The 'arbitrary and capricious' standard is essentially the same as an 'abuse of discretion' standard. . . ." *Mitchell v. Eastman Kodak Co.*, 910 F. Supp. 1044, 1047 (M.D. Pa. 1995), *aff'd*, 113 F.3d 433 (3d Cir. 1997).

> as they shall deem necessary and reasonable. Except as otherwise herein expressly provided, the trustees shall have the *exclusive right and discretion to interpret the Plan, to construe terms and to decide all questions arising in the administration and operation of the plan,* including but not limited to all questions of eligibility and status under the plan. Any such interpretations or decisions so made shall . . . be conclusive and binding on all persons; provided, however, that all such interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated.

(Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 11, Amendment No. 17 to the Restated Local Union No. 98 IBEW Pension Plan, at 8) [emphasis added]. I conclude, on the basis of the plan language, that the plan endowed the trustees with sufficient authority to interpret and construe the terms of the plan and make determinations with regard to eligibility. *See Firestone*, 489 U.S. at 115, 109 S. Ct. at 956-57.

Foley appears to concede that the trustees had sufficient discretionary authority over plan administration, but he argues that this Court should nevertheless review the trustees' decision *de novo* for two reasons. First, plaintiff argues, a *de novo* standard should be applied because the trustees voted in 1988 in favor of plaintiff's eligibility for credits accrued from 1959-71 despite his break in service, and then overturned that decision in 1995. It is unclear why plaintiff

believes that the trustees' two votes on eligibility would alter the standard of review to be applied by this Court. If plaintiff is arguing that the Supreme Court did not clarify the proper standard to be applied by courts in reviewing denial of benefits under ERISA until 1989 (in *Firestone*), and that because the trustees initially voted in favor of plaintiff's eligibility in 1988, this Court must apply the pre-1989 standard, his argument is unpersuasive. Putting aside the issue of whether a standard of review may be applied retroactively, this Court is reviewing the 1996 denial of benefits, not the trustees' preliminary judgments on plaintiff's eligibility in 1988 or 1995. It is an open question whether those prior judgments had any real effect at all on plaintiff's eligibility or were merely advisory, as plaintiff had not actually applied for benefits at the time those judgments were rendered. Because this Court is focused on the actual denial of plaintiff's application for his pre-break-in-service pension benefits in 1996, his Court is bound to apply the analysis set forth in *Firestone*.

Foley also argues that a *de novo* standard is required because the trustees have articulated new reasons to justify their denial of benefits that were not offered at the time the benefits were denied. *See Matuszak v. Torrington Co.*, 927 F.2d 320, 322-23 (7th Cir. 1991).[10] Plaintiff argues that

10. *Matuszak*, the only case cited by plaintiff in support of his "new reason" argument, involved far different facts than the present case. There, the plan administrator had articulated only one reason for the denial of benefits at the time of denial, and discarded that one reason in favor of a new, alternative reason at trial. *See Matuszak*, 927 F.2d at 322, n.1. Here, defendants have not disavowed any of the reasons given at the time Foley's benefits were denied, nor have they advanced novel reasons to this Court.

defendants have raised allegations of plaintiff's misconduct as a new reason for denying him benefits, and that this reason was not set forth in any of the prior denial-related correspondence with the trustees. This argument fails for two reasons. First, the trustees have not advanced plaintiff's alleged misconduct as the his benefits were denied; they have merely cited the allegations of plaintiff's misconduct as factual support for the trustees' revisitation of their 1988 determination of plaintiff's eligibility, and perhaps, as evidence support the stricter review of plaintiff's claim. Second, even if defendants were now offering Foley's alleged misconduct as a justification for denying his benefits, this would not constitute a new "reason." The fundamental reason for the trustees' denial of benefits that plaintiff failed to advance sufficient evidence to qualify for the available-for-work exception. Allegations that Foley lied to the trustees in 1988 about his availability for work would merely support trustees argument that he failed to bring forward sufficient evidence to qualify for the available-for-work exception. Thus, defendants' allegations of misconduct merely support the "reason" plaintiffs have advanced all along, and do not constitute an entirely new reason. Therefore, the denial of plaintiff's application for benefits is subject to an arbitrary and capricious standard of review, under which the denial "will not be disturbed if reasonable," *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 437 (3d Cir. 1997) (quoting *Firestone*, 489 U.S. at 111, 109 S. Ct. at 954).

I conclude that even under this deferential standard, a reasonable jury could find that the trustees' decision to deny plaintiff the pension was arbitrary and capricious. I do not believe that *any* reason will suffice to justify a benefits

decision under the arbitrary and capricious standard, particularly when there is evidence that a plan provision was interpreted differently in the case of one plan participant than in all other like cases.[11] To uphold a benefits decision that was facially rational but treated a particular plan participant differently from all others similarly situated would be to transform the arbitrary and capricious standard into a judicial rubber stamp and give plan administrators the freedom to single out one plan participant for stricter scrutiny so long as a mere reason could be identified for their decision. I refuse to render the arbitrary and capricious standard lifeless by allowing plan administrators to cloak egregiously disparate treatment in a blanket of rationality.

There is evidence in this case that plaintiff was denied eligibility for accrued pension credits because a stricter interpretation of a plan provision was applied to him, and not applied to any other similarly situated plan participants. This evidence takes the form of the "Confidential Report to the Trustees of the IBEW 98 Pension Plan Regarding Edward Foley," ("Confidential Report") which stated that the available-for-work exception "has been applied liberally," yet recommended that this exception be construed "much more strictly" by requiring additional evidence of availability for work in Foley's case. (Plaintiff's Response to Defendants'

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11. The Court of Appeals for the Third Circuit and other circuit courts have suggested that the disparate treatment of similarly situated individuals by a plan could be found to be arbitrary and capricious. *See DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 519 n.3 (3d Cir. 1997); *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1038 (7th Cir. 1990); *Varhola v. Doe*, 820 F.2d 809, 816 (6th Cir. 1987).

Appendix B

Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 6, "Confidential Report to the Trustees of the IBEW 98 Pension Plan Regarding Edward Foley," at 8).[12] While the report went on to say that other individuals' eligibility would have to be reviewed under this stricter standard, there is no evidence that anyone but Foley was subjected to the stricter standard.[13] The minutes of the

12. Attached to that report was Exhibit 4, in which other plan participants whose eligibility for the available-for-work exception was considered by the trustees were listed, and the factors considered by the trustees in deciding their eligibility for the exception were noted. According to that list, only one of the 21 participants who sought the exception was denied, and many of the participants apparently produced less evidence of their availability for work than plaintiff. In fact, one participant produced no evidence at all, and yet was determined eligible for benefits under the availability for work experience. (Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 6, Exhibits to Confidential Report, at 4).

13. In fact, there is affirmative evidence that Foley was the only individual to which the stricter standard was applied, as indicated by the following exchange during the deposition of trustee Thomas J. Reilly, Jr.

Q. So, correct me if I'm wrong, then, the trustees adopted a stricter standard of review to review [Foley's] case, but they did not adopt that stricter standard of review for the other individuals listed in Exhibit 4?

A. Correct.

(Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 17, Reilley Deposition, at 58).

trustees' meeting at which plaintiff's application for benefits was denied cited a lack of evidence of plaintiff's inability to obtain work during his break in service, raising an inference that plaintiff was subjected to the stricter evidentiary requirement recommended in the Confidential Report. (Plaintiff's Motion for Partial Summary Judgment, Exh. O, Minutes of the Special Meeting of the Board of Trustees of the I.B.E.W. Local Union No. 98 Pension Fund, Nov. 22, 1996). On this basis, a reasonable jury could find that defendants' treatment of Foley was arbitrary and capricious.[14]

While the Confidential Report is persuasive evidence, it does not warrant granting plaintiff's motion for summary

14. Defendants argue that plaintiff was not treated in a discriminatory matter, and that his claim was simply reviewed more carefully than others because of allegations that plaintiff had previously misled the trustees concerning his availability for work during his break in service. This argument is specious. The trustees were well advised to review Foley's claim for benefits in light of the accusations of misconduct leveled against him. However, they were not obliged to set a higher evidentiary threshold for plaintiff, and no one else, simply because an accusation had been made. In other words, the mere review of plaintiff's eligibility presents no problem for defendants; it is the stricter interpretation applied to the availability for work exception, and the consequent higher burden placed on plaintiff, that presents a serious question of capriciousness. Plaintiff has produced evidence that the trustees not only reviewed his claim, but held him to a higher evidentiary standard than any other applicant. (Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 6, "Confidential Report to the Trustees of the IBEW 98 Pension Plan Regarding Edward Foley," Exh. 17, Reilley Deposition, at 58; Plaintiff's Motion for Partial Summary Judgment, Exh. O, Minutes of the Special Meeting of the Board of Trustees of the I.B.E.W. Local Union No. 98 Pension Fund, Nov. 22, 1996).

judgment. The report sets forth the findings of an investigation, and makes recommendations to the trustees; there remains a genuine issue of material fact as to whether the trustees in fact adopted the recommendation of the report and applied stricter scrutiny to Foley's application. There is no express mention of applying a stricter standard in the minutes of the trustees' meeting in which Foley's eligibility for pre-break-in-service pension credits was denied. (Plaintiff's Motion for Partial Summary Judgment, Exh. O, Minutes of the Special Meeting of the Board of Trustees of the I.B.E.W. Local Union No. 98 Pension Fund, Nov. 22, 1996). While plaintiff's evidence raises an inference of disparate treatment, it is not conclusive, and a reasonable jury could find that plaintiff was not treated differently than other similarly situated individuals. Therefore plaintiff's motion for summary judgment as to his claim for benefits under ERISA will be denied.

The Confidential Report does, however, defeat defendants motion for summary judgment as to plaintiff's claim for benefits. A reasonable jury could find on the basis of the report and the deposition of Thomas J. Reilley, Jr. (Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 17, Reilley Deposition, at 58), that plaintiff was the only person whose petition under the available-for-work exception was subjected to a stricter level of scrutiny. Therefore, defendants motion for summary judgment on plaintiff's claim for benefits under ERISA will be denied.

3. *Merits of Equitable Relief Claims Under § 1132(a)(3)*

Plaintiff also seeks equitable relief under 29 U.S.C. § 1132(a)(3) for defendants' alleged breaches of fiduciary duties. Defendants argue that plaintiff is not entitled to equitable relief because he has not requested appropriate equitable relief and merely seeks relief that he could not receive under § 1132(a)(1)(B); that is, recovery of benefits. Plaintiff, defendants argue, has improperly disguised a claim for benefits as an action for equitable relief.

Though they rely heavily on it, defendants apparently have not carefully analyzed the Supreme Court's decision in *Varity v. Howe*, 516 U.S. 489, 116 S. Ct. 1065 (1996). *Varity* involved a company that duped employees in less profitable divisions into transferring their non-pension benefits into a new plan. *See Varity*, 516 U.S. at 494, 116 S. Ct. at 1069. The new plan became insolvent within two years, and the employees lost their accrued non-pension benefits completely. *See id.* The district court ordered the employer to reinstate its former employees into the company's old plan, and the Court of Appeals for the Eighth Circuit affirmed. *See id.* at 495, 116 S. Ct. at 1069. The Supreme Court also affirmed, holding that the order to reinstate the employees into the old plan under § 1132(a)(3) was "appropriate" where other relief was unavailable under ERISA. *See id.* at 515, 116 S. Ct. at 1079. The Supreme Court so concluded despite the fact that a reinstatement would have essentially the same effect as recovery of benefits. Furthermore, the Court of Appeals for the Third Circuit has held that § 1132(a)(3) does not preclude the awarding of the full range of equitable

remedies, including injunctions, of appropriate, or even monetary restitution of back benefits not otherwise available. *See In Re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255, 1269 (3d Cir. 1995) (citing *Curcio*, 33 F.3d at 238-39); *see also Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 516 U.S. 489, 116 S. Ct. 1065 (1996). I thus conclude that plaintiff has requested appropriate equitable relief under § 1132(a)(3).[15]

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15. There is a legal question as to whether or not plaintiff may seek both recovery of benefits under § 1132(a)(1)(B) and equitable relief § 1132(a)(3). Section 1132(a)(3) has been referred to as a "catch-all" provision, and a "safety net, offering appropriate equitable relief for injuries cause by violations that § 502 does not elsewhere adequately remedy." *Harte v. Bethlehem Steel Corp.*, No. 98-2052, 2000 U.S. App. LEXIS 2928 (3d Cir. Feb. 29, 2000) (quoting *Varity*, 516 U.S. at 512, 116 S. Ct. at 1078). Some courts have thus concluded that a plaintiff may not bring a claim under § 1132(a)(3) where a claim could be brought under § 1132(a)(1)(B). *See e.g., Wald v. Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1005 (8th Cir. 1996) (finding equitable relief not appropriate because plaintiff provided adequate relief by right to bring claim for benefits under § 502(a)(1)(B)). I am not certain that this is so. Apparently, these courts have relied on the Supreme Court's observation in *Varity* that equitable relief could be sought only when other remedies were "unavailable" to plaintiff. However, it is unclear to me what the Supreme Court meant by "unavailable," i.e. whether the Court intended to refer to remedies for which plaintiff could not state a claim, or remedies upon which plaintiff could not prevail at trial, or something else. I do not decide this question today and hold that plaintiff may continue to seek relief under both § 1132(a)(1)(B) and § 1132(a)(3). If, however, the plaintiff wishes to drop one of these claims as duplicative or the parties desire to brief this issue at a later date, the Court will entertain such requests.

Appendix B

In considering the relief plaintiff has requested, I must determine whether plaintiff has produced sufficient evidence to convince a reasonable jury that defendants engaged in conduct that warrants an award of equitable relief. Plaintiff alleges numerous breaches of fiduciary duties, which are compensable under § 1132(a)(3). *See Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1012 (3d Cir. 1997) ("After *Varity* there is little doubt that ERISA provides plan participants an equitable cause of action for an administrator's breach of fiduciary duty.") (citing *Varity Corp. v. Howe*, 516 U.S. 489, 513, 116 S. Ct. 1065, 1078, (1996)). ERISA does not define specific fiduciary duties; rather, it sets forth the standard of care and leaves to the courts the determination of what constitutes a breach of a fiduciary duty. *See Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993).[16] Plaintiff alleges

16. ERISA states:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

29 U.S.C. § 1104.

two major breaches by the Plan Defendants: disparate treatment and equitable estoppel.[17]

a. Disparate Treatment

Foley states that the plan was orally amended in a way that treated him differently than other applicants by requiring him to make a more substantial showing as to the available-for-work exception. While the evidence does not indicate

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17. Plaintiff also submits a laundry list of other ways in which the Plan Defendants allegedly violated their fiduciary duties by (1) amending the plan; (2) ignoring the advice of counsel; (3) failing to keep minutes of meetings at which decisions concerning plaintiff's eligibility were made; (4) failing to place a union trustee on the subcommittee; (6) failing to respond to his application for benefits in a timely fashion; and (6) releasing information about his pension to the local union board.

On the first point, I note that the there is no evidence that the plan was amended. See infra, p. 28. Furthermore, standing alone, a plan amendment does not raise to the level of a breach of a fiduciary duty. *See Bennett v. Conrail Matched Savings Plan Administrative Committee*, 168 F.3d 671, 679 (3d Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 173 (1999) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 437-38, 119 S.Ct. 755, 760 (1999)). Likewise, failing to follow the advice of counsel does not give rise to a breach of a fiduciary duty. I do not read *Reich v. Compton*, 57 F.3d 270, 291 (3d Cir. 1995) to transform a failure to take an attorney's advice into a cause of action under ERISA. Regardless, I conclude that a reasonable jury could not find that the trustees breached their duty by not following a recommendation buried in a report that happened to be written by an individual who also was fund counsel. The remaining alleged breaches are minor and procedural in nature and do not rise to the level of a breach of fiduciary duty in the administration of the plan remediable by § 1132(a)(3).

that an amendment of the plan took place,[18] plaintiff has produced evidence upon which a reasonable jury could find that a stricter standard was applied to his claim insofar as the trustees required plaintiff and no one else to produce additional evidence of his eligibility under the available-for-work exception. (Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment, Exh. 6, "Confidential Report to the Trustees of the IBEW 98 Pension Plan Regarding Edward Foley," at 8). The Confidential Report thus raises a genuine issue of material fact as to whether the trustees violated their duty under the plan to ensure that all their "interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated." (Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings and Summary Judgment, Exh. 11, Amendment No. 17 to the Restated Local Union No. 98 IBEW Pension Plan, at 8). Therefore, the Plan Defendants' motion for summary judgment will be denied as to plaintiff's claim for a breach of fiduciary duty based on defendants' disparate treatment of plaintiff.

That said, I also conclude that a reasonable jury could find on the record before me that the Plan Defendants did not violate their fiduciary duty. The Confidential Report does not conclusively establish that the trustees in fact treated plaintiff differently from all other similarly situated individuals, and thus plaintiff's motion for summary judgment will be denied as well.

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18. *See infra* text, p. 27-28.

Appendix B

b. Equitable Estoppel

Plaintiff asserts claims of equitable estoppel under ERISA on the ground that the trustees should be bound by their 1988 decision to grant him credit for benefits accrued prior to his break in service. Defendants argue that plaintiff has failed to properly state a claim for equitable estoppel.

Assuming, but not deciding, that plaintiff has failed to state a claim for equitable estoppel, plaintiff has not produced sufficient evidence upon which a reasonable jury could rule in his favor on that claim. In order to recover benefits on an equitable estoppel theory under ERISA, a plaintiff must establish "a material misrepresentation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances." *UAW Local No. 1697 v. Skinner Engine Co.*, 188 F.3d 130, 151 (3d Cir. 1999) ("*UAW*") (quoting *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 907 (3d Cir. 1995)).

A reasonable trier of fact would not find any of these elements satisfied on the record before me. Plaintiff has not demonstrated that any plan representatives made misrepresentations to him; his claim is based merely on truthful communications concerning votes of the trustees. While plaintiff may have relied on the plan's earlier decision in some existential way, but there is no evidence that plaintiff's reliance was detrimental; it is unclear what plaintiff would or could have done to improve his chances of eligibility for the available-for work exception had the trustees not voted the way they did in 1988. Finally, I conclude that there is insufficient evidence of "extraordinary circumstances,"

which, according to the Court of Appeals for the Third Circuit, includes bad faith or fraud over an extended course of dealings or a particular vulnerability in the claimant. *See UAW*, 188 F.3d at 152. Therefore, defendants' motion for summary judgment will be granted as to plaintiff's claim for equitable relief on the basis of estoppel.

4. *Statutory Penalties Under 29 U.S.C. § 1132(c)*

Plaintiff seeks summary judgment on his claim for an award of statutory penalties against defendants under ERISA, 29 U.S.C. § 1132(c) for their failure to provide him with a statement of his benefits pursuant to 29 U.S.C. § 1025(a)(1) and (2). Leaving aside for the moment the issue of who would be the proper defendant under this claim, the key question is whether Foley made a request in writing for a statement of benefits, as required under § 1025(a)(1) and (2).[19] This requirement has been strictly construed by the Court of Appeals for the Third Circuit. *See Haberern v. Kaupp Vascular Surgeons*

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19. Section 1025(a) reads:

> Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information —
>
> (1) the total benefits accrued, and
>
> (2) the nonforfeitable pensions benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1505 (3d Cir. 1994); *cert. denied*, 513 U.S. 1149, 115 S. Ct. 1099 (1995); *see also Crotty v. Cook*, 121 F.3d 541, 547-48 (9th Cir. 1997).

Plaintiff offers no evidence that he submitted a written request for a statement of benefits to the plan, the trustees, or the plan administrator. The sole evidence plaintiff advances in this regard is a notation by Fund Manager Lawrence McLaughlin to the trustees that reads, in its entirety, "The Fund Manager, requests Trustee direction concerning the information to be included on Mr. Foley's Annual Participant Statement for Plan Year ended December 31, 1994." No reasonable jury could interpret this administrative notation to be a written request for a statement of benefits, nor could one conclude that it was submitted on Foley's behalf. Foley offers no evidence that this notation was submitted at his request, nor does he suggest that he made any other written request for a statement of benefits personally or through counsel.[20]

Therefore, Foley's motion for summary judgment on his claim for sanctions will be denied. Furthermore, because there is no genuine issue of material fact as to whether plaintiff submitted a request, summary judgment will be granted in favor of defendants on plaintiff's claim for sanctions.

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20. Furthermore, district courts have discretion in deciding whether or not to assess penalties under § 1132(c), and courts have considered factors such as bad faith, intentional misconduct, the length of the delay, the number of requests made, and the existence of any prejudice to the participant. *See Bovadjian v. Cigna Companies*, 973 F.Supp. 500, 505 (D.N.J.1997). Even if a written request were made, these factors would militate against the award of sanctions in this case.

5. *Attorneys' Fees Under 29 U.S.C. § 1132(g)(1)*

As defendants correctly note, plaintiff's request for summary judgment on his claim for attorneys' fees under ERISA, 29 U.S.C. § 1132(g)(1), puts the cart before the horse. Judgments as to attorneys' fees are premature at this stage, and are properly considered after the merits phase of the case. The Court will consider the arguments of plaintiff and defendant on the matter of attorneys' fees and costs at a later time.

C. LMRDA Claims

Plaintiff avers that his free speech rights under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2)[21] were violated by defendants' conduct and seeks

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21. Section 411(a)(2) provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

recovery under LMRDA, *29 U.S.C. §§ 412*[22] and 529.[23] Defendants move for summary judgment on the ground that plaintiff has produced insufficient evidence to sustain a claim under LMRDA.[24]

Even taking an "expansive view of union speech rights," as I am required to, *Ruocchio v. United Transp. Union, Local 60*, 181 F.3d 376, 386 (3d Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1158 (2000) (citing *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3d Cir. 1981) and *Semancik v. United Mine Workers of America District #5*, 466 F.2d 144 (3d Cir. 1972)), I cannot conclude

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22. *Section 412* reads, in pertinent part,

Any person whose rights secured by the provisions of this subchapter have been infringed by any violations of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

23. *Section 529* states that

it shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this [Act].

24. It should be noted that plaintiff's LMRDA claims against the Plan Defendants cannot stand; LMRDA governs unions and union members, and is meant to protect the rights of individuals to participate in unions. *Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2d Cir. 1976). LMRDA does not govern pension plans or pension fund trustees. Thus, plaintiff may proceed under LMRDA only against the Union Defendants.

that plaintiff presents a genuine issue of material fact as to whether his free speech rights were violated.

First, plaintiff's claim for relief under 29 U.S.C. § 529 cannot stand, because plaintiff has neither claimed nor shown through evidence that the union formally fined, suspended, expelled, or otherwise disciplined Foley. The Supreme Court has held that the phrase "otherwise discipline" is limited to "punishment authorized by the union as a collective entity to enforce its rules." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 90, 110 S. Ct. 424, 438-39 (1989). The only authorized actions alleged in the complaint are those of the trustees and other plan defendants; there is neither allegation nor evidence that the Union Defendants took action in their capacity as union officials against Foley that constituted formal punishment intended to enforce union rules.[25] At most, plaintiff alleges that a member or members of the union raised questions about his pension eligibility in retaliation for prior conduct related to union politics. This is essentially what took place in *Breininger*,[26] and the Supreme Court nevertheless concluded that no claim under ERISA had been stated. *See id. at 94, 110 S. Ct. at 440; see also Brenner v. Local 514, United Bhd. of Carpenters & Joiners of America*, 927 F.2d 1283, 1297

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25. To the extent that plaintiff alleges anything against the individual Union Defendants, Dougherty and Nielson, he alleges conduct taken in their capacity as trustees, not as union officials.

26. In *Breininger*, the plaintiff claimed that union officers failed to refer plaintiff for employment because he supported a political rival of theirs in a union election. The Court held that this did not constitute discipline; merely "personal vendettas." *Id.* at 94, 110 S. Ct. 440.

(3d Cir. 1991). Thus, summary judgment will be granted to defendants on plaintiff's claim under *§ 529*.

Foley's claims under 29 U.S.C. § 411(a)(2) fail because he has not produced sufficient evidence that the decision regarding his eligibility for pension benefits had anything to do with the exercise of his free speech rights guaranteed under § 411(a)(2). There is nothing on the record that would lead a reasonable juror to the conclusion that the trustees denied him the benefits he accrued from 1959-71 because he engaged in expressive activity protected by LMRDA. At best, plaintiff's evidence shows that a non-trustee union member, Fred Compton, had a "personal vendetta," *Breininger*, 493 U.S. at 94, 110 S. Ct. at 440, against Foley because Foley had defeated him in a prior union election, and sought to retaliate by raising questions about Foley's pension eligibility. While Compton's complaints may have led the trustees to review Foley's eligibility, Foley has no evidence that the trustees' decision on his pension benefit eligibility was tainted by a motive to suppress, deter, or punish his free speech rights under § 411(a)(2).

Two fairly recent district court cases are instructive. *Webb v. Local 1814*, No. 94-2739, 1996 U.S. Dist. LEXIS 20516 (E.D.N.Y. Feb. 9, 1996), involved longshoreman plaintiffs whose wage credits were docked due to their unavailability for work during a union conference.[27] Plaintiffs alleged that

27. Plaintiffs in *Webb* were operating under a wage-guarantee provision under which participants who made themselves available for work when there was work to perform would receive wages, regardless of whether or not they worked on a given day. If plaintiffs failed to make themselves available, they received two kinds of debits:

(Cont'd)

their wage credits were docked at a higher level than they should have been in retaliation against the reform proposals plaintiffs had presented at union conferences and brought suit under ERISA and LMRDA. The district court held that *§ 411(a)(2)* requires "a direct infringement of membership rights or a real threat to the democratic integrity of the union." *Webb*, 1996 U.S. Dist. LEXIS 20516, at * 44 (quoting *Franza v. International Brotherhood of Teamsters, Local 671*, 869 F.2d 41, 49 (2d Cir. 1989)). The court held that the right to the credits was not inherent or incident in union membership, and that the reduction of the credits was not considered a "direct interference" in their membership rights. *Id.* at * 46; *see also Finnegan v. Lew*, 456 U.S. 431, 102 S. Ct. 1867 (1982) (discharge of union employees in retaliation for union election activities merely an indirect interference with membership rights, and thus not actionable under LMRDA).

The similarities between the two cases are manifest: both involve (1) plaintiffs who allege they were denied benefit credits (2) under a provision that required them to be available for work (3) when a higher level of scrutiny was applied to their benefits claims, (4) allegedly because of plaintiffs' expressive activity. The major difference is that *Webb* involved a far more direct link than in this case; there, plaintiffs had direct evidence of expressive activity they had engaged in proximate to the denial of wage credits, whereas

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(Cont'd)

a higher debit that denied them eight hours of credits, and a lower debit applied when sufficient reasons was given for unavailability. The *Webb* plaintiffs, like Foley, had expected a lower level of scrutiny to be applied to their work credits, but a higher level of scrutiny was applied by Fund officials.

here, Foley points to amorphous, years-old activities that have no direct link to his denial of benefits. The court in *Webb* concluded, on more compelling evidence than that on the record in this case, that plaintiff could not survive summary judgment under LMRDA because there was no direct interference in a protected right. I reach the same conclusion here; plaintiff has not demonstrated a direct nexus between any expressive activity he engaged in and the denial of benefits.

A compelling analogy may also be drawn between the instant action and *Lennon v. Walsh*, 798 F.Supp. 845 (D.Mass.1992). There, plaintiff asserted claims under ERISA and LMRDA arising out of his removal from union office and the denial of his pension benefits. In language strikingly similar to that of plaintiff in the instant action, the *Lennon* plaintiff claimed that the denial of his pensions benefits "directly interfered with his union membership rights because the denial of benefits was part of a concerted effort to quash his dissent." *Id.* at 850. The *Lennon* court observed,

> If this court were to adopt plaintiff's reasoning, however, every person denied benefits by a union fund or plan might assert a cause of action under the LMRDA. Moreover, allowing plaintiff's claim would eviscerate the requirement that to state a claim under Title I of the LMRDA a plaintiff must allege that the challenged action directly infringed the plaintiff's union membership rights. Accordingly, plaintiff's claims against the Staff Pensions Plan must be dismissed.

Id. Here, Foley seeks to assert a claim on an even shakier evidentiary foundation than the plaintiff in *Lennon,* who alleged that he was removed from union office and denied benefits because of his support of a change in the union's leadership succession and was thereafter harassed by those opposed to the change in myriad ways related directly to his union membership. *See id.* at 847. Foley does not advance substantial evidence of a "concerted effort," nor has he produced evidence that he was harassed in other respects related to his union membership; the only allegation supported by the record is that Foley's pension benefits were withheld.

I concur with the *Lennon* court that to allow a claim alleging merely the withholding of benefits to proceed under LMRDA would contravene the language of LMRDA and the jurisprudence of the Supreme Court and the circuit courts, particularly in a case such as this where there is no evidence of direct interference with union membership rights protected under § 411. A pension benefits-related claim is properly asserted under ERISA, which plaintiff has done. His attempt to eke further mileage out of his denial of pension credits stalls before this Court. Defendants' motion for summary judgment will be granted on plaintiff's claims under LMRDA.

C. Alleged Plan Amendment

Plaintiff also asserts claims under ERISA, LMRDA and, remarkably, even the Internal Revenue Code, alleging that the trustees improperly amended the plan in requiring plaintiff to produce evidence of his availability for work and the unavailability of work during his break in service.

The evidence before me evinces nothing that could be construed as an amendment to the plan. Plaintiff points to the Confidential Report in which it was recommended that the available-for-work exception should be construed more strictly in Foley's case. This is not a plan amendment; it is merely an interpretation of the plan by the trustees. The minutes of the trustees November 22, 1996, meeting, at which it considered Foley's claim, contain no reference to an amendment to the plan.

No reasonable jury could conclude on this record that the plan was amended. Therefore defendants' motion for summary judgment on plaintiff's claims under Count V will be granted.

D. Defendants' Counterclaims

The Plan Defendants assert three counterclaims against plaintiff for alleged breaches of fiduciary duties during his time as a plan trustee.[28] Plaintiff moves for summary judgment on all three counterclaims.

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28. Count I alleges that plaintiff engaged in unauthorized negotiations concerning the use of plan funds to bankroll the renovation of a Philadelphia hotel, and that plaintiff's lapses exposed the pension fund to the possibility of investigation by the Department of Labor. Count II alleges that plaintiff breached his duty of loyalty to the trust by trying in 1988 to convince co-trustees to rule in his favor concerning his benefits. Count III alleges that plaintiff withheld information from the trustees concerning possible claims other plan participants might bring against the trustees.

Appendix B

In his memorandum, plaintiff points to an absence of a genuine issue of material fact on each claim. (Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment, at 36-39). By doing so, plaintiff has shifted the burden under *Rule 56(c)* to defendants, who must now "go beyond the pleadings and by their own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986).

Defendants have not done so. Their four-sentence response to plaintiff's motion for summary judgment on defendants' counterclaims is paltry; they make no reference to any evidence on the record that could form the basis of a reasonable jury's verdict on defendants' favor on their counterclaims. Thus, I conclude that defendants have not carried their burden on summary judgment, and plaintiff's motion for summary judgment on defendants' counterclaims will be granted.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment will be granted as to defendants' counterclaims, but denied as to plaintiff's claims, and Plan Defendants' motion will be granted as to Counts II, III, IV, and V, and denied as to Count I, and the Union Defendants motion will be granted in full. Subject to the above analysis, plaintiff may proceed to trial on the ERISA claims in Count I of the complaint, but may not proceed under LMRDA or ERISA on the claims asserted in Counts II, III, IV, and V.

An appropriate Order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 98-906

EDWARD J. FOLEY, SR.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,

Defendants.

ORDER

AND NOW, this 29th day of March, 2000, upon consideration of the cross-motions for summary judgment of the plaintiff Edward J. Foley, Sr. (Document No. 46), and defendants International Brotherhood of Electrical Workers Local Union 98 Pension Fund, et al. (Document Nos. 44 and 45), and having concluded pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure, for the reasons set forth in the foregoing memorandum, that there remain genuine issues of material fact as to some of plaintiff's claims, it is **HEREBY ORDERED** that

Appendix B

(1) The motion of plaintiff Edward J. Foley, Sr., for partial summary judgment (Document No. 46) is **DENIED as to all plaintiff's claims**;

(2) The motion of plaintiff Edward J. Foley, Sr., for partial summary judgment (Document No. 46) is **GRANTED as to all defendants' counterclaims**;

(3) The motion of defendants International Brotherhood of Electrical Workers Local Union 98 Pension Fund and Scott Ernsberger and John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilley, Jr., Dennis Link, William C. Rhodes, Roy Dantz, and Larry Bradley in their capacities as trustees for summary judgment (Document No. 44) is **DENIED as to Count I** of plaintiff Edward J. Foley, Sr.'s complaint.

(4) The motion of defendants International Brotherhood of Electrical Workers Local Union 98 Pension Fund and Scott Ernsberger and John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilley, Jr., Dennis Link, William C. Rhodes, Roy Dantz, and Larry Bradley in their capacities as trustees for summary judgment (Document No. 44) is **GRANTED as to Counts II, III, IV, and V** of plaintiff Edward J. Foley, Sr.'s complaint.

Appendix B

(5) The motion of defendants International Brotherhood of Electrical Workers Local Union 98, John J. Dougherty, and Edward Neilson in their capacities as Union Officers (Document No. 45) is **GRANTED as to all counts** in plaintiff Edward J. Foley, Sr.'s complaint.

s/ Lowell A. Reed, Jr.
LOWELL A. REED, JR., S.J.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED DECEMBER 7, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 98-906

EDWARD J. FOLEY, SR.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,

Defendants.

Reed, S.J. **December 7, 2000**

MEMORANDUM

Now before the Court are the motion of defendants John Dougherty and Edward Nielson, in their capacities as officers of the International Brotherhood of Electrical Workers Union Local 98 ("Local 98"), for allowance of attorneys' fees under the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401, *et seq.* ("LMRDA") (Document No. 61), and the motion of plaintiff Edward J. Foley, Sr., for attorneys'

fees under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") (Document No. 80). For the following reasons, the motion of defendants Dougherty and Nielson will be denied, and the motion of plaintiff Foley will be granted.

Background

The facts of this case have been spelled out in greater detail on previous occasions, and therefore, I provide here only a brief outline of plaintiff's claims. Plaintiff brought this action under LMRDA and ERISA, alleging that he was denied 12.5 years of pension benefits he had accrued prior to a break in service in employment covered that was "covered" by the Local 98 pension plan (employment in the electrical industry). The pension fund trustees had denied plaintiff's request for eligibility under an exception to the plan's break-in-service provision, under which plan members who meet certain criteria may receive credits accrued prior to a break in service.

This Court granted summary judgment in favor of defendants on plaintiff's claim under LMRDA that his free speech rights were violated by the union defendants, including Dougherty and Nielson, but denied summary judgment as to plaintiff's ERISA claims. *See Foley v. IBEW Local Union 98 Pension Fund*, 91 F. Supp. 2d 797 (E.D.Pa.2000) *("Foley I")*. Following a non-jury civil trial on August 21 and 22, 2000, this Court found that plaintiff was treated differently from all other persons similarly situated in that his petition for eligibility under the break-in-service exception was subjected to a more demanding

evidentiary standard and a stricter level of scrutiny than the petitions of those similarly situated to him. *See Foley v. IBEW Local Union 98 Pension Fund*, 112 F. Supp. 2d 411 (E.D. Pa. 2000) *("Foley II")*. The Court therefore concluded that the trustees' decision to deny plaintiff his accrued pension benefits was arbitrary and capricious, and that plaintiff was entitled to a recovery of benefits under ERISA, 29 U.S.C. § 1132 (a) (1) (B), and granted judgment in favor of Foley and against the pension fund in the amount of $99,624.65. *See id.* at 416.

Defendants Dougherty and Nielson filed their motion for attorneys' fees under LMRDA following this Court's summary judgment ruling, and plaintiffs filed their motion under ERISA following the trial.

Defendant's Motion

The motion of defendants Dougherty and Nielson is without merit. The LMRDA section they cite as the basis for their request contains no provision for an award of attorneys' fees. While the Supreme Court has ruled that the attorneys' fees of successful *plaintiffs* may be reimbursed under Title I of LMRDA, *see Hall v. Cole*, 412 U.S. 1, 7-9, 93 S.Ct. 1943 (1973), defendants cite not one case, nor could I discover any case in my own research, in which a successful *defendant* was awarded attorneys' fees under Title I of LMRDA.

The reason for this is that the Supreme Court's stated justification for awarding attorneys' fees under LMRDA was a plaintiff-centered concept called the "common benefit doctrine." The common benefit doctrine applies when "the

plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction overt the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.' " *Hall*, 412 U.S. at 5 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-97, 90 S.Ct. 616 (1970)) (emphasis added). Cases brought under Title I of LMRDA are intended to vindicate a union member plaintiff's right of participation in union affairs, and thus a successful plaintiff "necessarily render[s] a substantial service to his union as an institution and to all its members." *See id.* at 8. Because an award of attorneys' fees would be paid out of union coffers, the Court held that allowing an award of attorneys' fees would shift the cost of the litigation to the class benefitted by it (the union members) and was a justified use of the Court's equitable power. *See id.* at 9.

The window the Supreme Court opened in *Hall* for reimbursement of attorneys' fees under Title I was quite a small one, and it is clear that the defendants Dougherty and Nielson cannot fit through it. *Hall* permits only plaintiffs to recover attorneys' fees under ERISA, and Dougherty and Nielson were defendants here. No right of participation was vindicated by this Court's grant of summary judgment in defendants' favor on plaintiff's LMRDA claim, and an award of attorneys' fees in this case would not shift the cost of the litigation to a person or class that was benefitted by dismissal of the LMRDA claims; rather, it would come out of the pocket of the plaintiff, who was not benefitted by the dismissal of his LMRDA claims. Thus, the common benefit doctrine does not apply in a case in which the defendant prevails, and a defendant may not recover attorneys' fees under Title I of LMRDA.

Accordingly, the motion of defendants Dougherty and Nielson for allowance of attorneys' fees is denied.

Plaintiff's Motion

Plaintiff's motion travels a better-worn path than defendants'. Under to ERISA, a court may, in its discretion, award "reasonable" attorneys' fees to either party. *See* 29 U.S.C. § 1132 (g) (1).[1] While the statute itself offers no criteria to guide a court's exercise of its discretion, the Court of Appeals for the Third Circuit has used the following five-factor test for determining whether an award of fees to a prevailing party is warranted under § 1132 (g) (1):

(1) the offending parties' culpability or bad faith:

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' positions.

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1. The statute provides, "In any action under this subchapter . . . by a participant . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132 (g) (1).

See Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). The court of appeals has instructed that "there is no presumption that a successful plaintiff in an ERISA suit should receive an award in the absence of exceptional circumstances." *McPherson v. Employees' Pension Plan of Am. Re-Insurance Co., Inc.*, 33 F.3d 253, 254 (3d Cir. 1994) (citing *Ellison v. Shenango, Inc. Pension Bd.*, 956 F.2d 1268, 1273 (3d Cir. 1992)). Furthermore, according to the court of appeals, district courts must articulate their analyses and conclusions as to each of the five factors. *See Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1012 (3d Cir. 1992).

1. Culpability or Bad Faith

The first factor does not require a finding of bad faith or ulterior or sinister purpose. *See McPherson*, 33 F.3d at 256-57. A court can find against a party on the first factor when the conduct at issue involved blameable conduct that constituted "something more than simple negligence." *Id.* at 257. Thus, this Court's prior finding that the fund trustees acted in good faith, *see Foley II*, 112 F. Supp. 2d at 415, is not dispositive of the first factor.

The conduct at issue in this case was the disparate treatment plaintiff received at the hands of the defendant pension fund. Documents generated by and for the pension trustees at the time plaintiff's application for benefits was considered reflected that plaintiff's application was being subjected to a stricter evidentiary standard than any other similar application. *See Foley II*, 112 F. Supp. 2d at 413, ¶¶ 17-21. Uncontroverted testimony at trial established that, in the time before and after plaintiff's application was considered, no other pension plan participant was required

to produce the quantum of evidence that the plan trustees demanded of plaintiff. *See id.* at ¶¶ 33-36. The conduct was arbitrary and capricious and violated the plan's assurance to its union members "that all ... interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated." *See id.* at 416, ¶ 49. This Court concluded that the subjective, good faith belief of the fund trustees did not alter the fact that plaintiff was treated differently from all other individuals similarly situated. *See id.* at 414, ¶ 31. Thus, I conclude that the conduct of the pension fund was sufficiently culpable to warrant a finding in plaintiff's favor on the first factor.

These circumstances are much like those the Court of Appeals for the Third Circuit faced in *McPherson.* There, a plan committee denied the plaintiff's request for a lump-sum distribution of his benefits. The plan committee's stated reasons were that lump-sum payments would threaten plan stability, that the plan had never distributed lump-sum payments to anyone under 62, and that the plan language disfavored such payments. *See McPherson*, 33 F.3d at 257. The district court found that in fact the plan was flush with funds and lump-sum payments would have had no impact on its stability; that at least two individuals under 62 had been given lump-sum payments prior to plaintiff; and that the plan explicitly provided for such distributions. *See id.* Furthermore, the district court found that a significant amount of time elapsed (six years), during which the plan had ample opportunity to reevaluate its untenable position, but the plan failed to do so. *See id.* Under such circumstances, the Court of Appeals for the Third Circuit held, a court could find in the plaintiff's favor on the first factor. *See id.*

Appendix C

This case shares key elements in common with *McPherson*. First, plan decisionmakers denied plaintiff's request while granting the request of others who were plainly similarly situated. Second, here, as in *McPherson*, the proffered reasons of the plan for denying the request do not hold up under scrutiny and the plan does not require the conclusion the decisionmakers reached. Third, just as in *McPherson*, significant amounts of time elapsed between the plan decisionmakers' original denial of plaintiff's request and its final denial, and thus plan decisionmakers had plenty of time (more than two years) to revisit their decision, but failed to do so.[2]

In light of *McPherson*, I conclude that there is sufficient culpability here on the part of the fund to find in plaintiff's favor on the first element.

2. Ability to Pay

There is no question that the Local 98 plan has sufficient funds to pay the attorneys' fees requested in this case. The plan has more than $130,000,000 in its coffers, and plaintiff has requested just over $130,000. Defendants concede this point, and I find it weighs in plaintiff's favor.

3. Deterrent Effect

An award of attorneys' fees in this case would have a deterrent effect on the Local 98 pension fund. The fund

2. Arguably, the denial in this case was more serious, and the culpability therefore greater, than in *McPherson*, because the plaintiff here was denied 12 1/2 years of pension credits outright, whereas the plaintiff in *McPherson* was merely denied the method of payment he preferred.

trustees undoubtedly will consider applicants for benefits under the provisions at issue in this case and under other provisions in the wake of this case, and an award of attorneys' fees would call attention to their responsibility to follow the plan mandate to treat similarly situated applications in a similar manner. *See McPherson*, 33 F.3d at 258 (deterrence of conduct that did not rise to the level of bad faith furthers the objectives of ERISA and may be considered under the third factor). Therefore, I conclude that this factor weighs in plaintiff's favor.

4. Benefit to Plan Members

An award of attorneys' fees in this case will have little or no effect on other plan members, with the exception of the above-mentioned deterrent effect on future applications. Thus, this factor weighs in neither party's favor.

5. Relative Merits

This was not a close case. The documentary and testimonial evidence in the case decisively supported plaintiff's allegation that he was treated differently from every other person who sought refuge under the plan's break-in-service exception. *See Foley II*, 112 F. Supp. 2d at 413-15, ¶¶ 15-36. ERISA's prohibition against arbitrary and capricious conduct clearly prohibits such dramatically disparate treatment. *See Foley I*, 91 F. Supp. 2d at 805. Thus, the facts and the law weighed heavily in plaintiff's favor, and this factor weigh's heavily in favor of awarding attorneys' fees and costs.

My consideration of the five factors reveals that the first, second, third, and fifth factors each support plaintiff's motion for attorneys' fees and costs. Therefore, plaintiff's request for attorney's fees under § 1132(g) (1) will be granted.

Amount of Award

Defendants object that plaintiff should not be awarded attorney fees for the non-ERISA claims on which judgment was granted in favor of the defendants, and that plaintiff should not recover for time spent bringing trial counsel Daniel McElhatton up to speed on the case or for the time original counsel, Edward J. Foley, Jr.,[3] spent in trial while Mr. McElhatton tried the case. I disagree with the first of defendants' contentions,[4] but agree with respect to the duplication of effort between Mr. McElhatton and Mr. Foley, Jr. The billing records submitted by counsel do not provide clear delineations as to the amount of time spent on

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3. Edward J. Foley, Jr., is the son of the plaintiff, and the Court and counsel agreed that plaintiff would be best served if counsel other than plaintiff's son tried the case.

4. First, plaintiff's counsel states in his affidavit that he deducted the hours spent on non-ERISA claims from the billing records submitted. (Plaintiff's Exhibit 5, Affidavit of Edward J. Foley, Jr., at ¶ 8). Second, court need not deduct time spent on non-ERISA claims where the non-ERISA claims arise out of the same common nucleus of operative fact and involve similar claims for relief and similar legal theories. *See Egert v. Connecticut General Life Ins. Co.*, 768 F.Supp. 216 (N.D.Ill.1991) (prevailing plaintiffs were not required to deduct time spent on unsuccessful, non-ERISA claims where such claims sought similar relief, arose out of a common core of operative facts, and were based on related legal theories). Second, it appears from counsel's billing records that the ERISA claims were the core of plaintiff's claims against defendants and that counsel devoted very little time to the non-ERISA claims.

claims other than ERISA, and the amount of time spent educating Mr. McElhatton about the case. Nevertheless, I must make a reasonable estimate based on the information provided by the plaintiff.

It is reasonable to conclude that the hours Mr. McElhatton spent on the case prior to the filing of his appearance (prior to July 5, 2000) constituted the time during which he educated himself about the case and considered taking the case.[5] Furthermore, it is reasonable to conclude that the time spent by Mr. Foley meeting with and otherwise communicating with Mr. McElhatton prior to his appearance constituted time spent educating Mr. McElhatton about the case. Such time is duplicative and would not have been necessary if plaintiff had, at the outset of the case, selected counsel who could take the case to trial, and therefore the amount of plaintiff's award of counsel fees will be reduced by such time. As for Mr. Foley's participation in the trial itself, I conclude, based on the billing records and my own observations, that while Mr. Foley performed a number of functions in trial preparation, his role in the trial itself was minuscule.[6] Therefore, plaintiff's fee request will be reduced by the amount of time Mr. Foley spent in trial.

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5. My calculations reflect that Mr. McElhatton spent a total of 23.8 hours on matters related to the case prior to the filing of his appearance on July 5, 2000, (Document No. 66). At Mr. McElhatton's hourly rate of $250, that constitutes $5,950, which will be deducted from Mr. McElhatton's total fee request.

6. Counsel Foley billed a total of 6.9 hours meeting with and speaking with Mr. McElhatton prior to the filing of Mr. McElhatton's appearance, and a total of 13.7 hours at trial. At Mr. Foley's hourly rate of $175 per hour, that is a total of $3,605, which will be deducted from Mr. Foley's total fee request.

Appendix C

I have reviewed plaintiff's request and supporting documents carefully, and believe plaintiff's remaining attorneys' fees reflect reasonable compensation for the efforts of counsel. Plaintiff has submitted affidavits from both of his attorneys detailing their professional backgrounds, explaining the time spent on the case, and justifying their hourly rates. (Plaintiff's Exhibits 5 and 6.) Accompanying those affidavits are detailed billing records reflecting the time counsel spent on the case, and I find those billing records to indicate reasonable efforts on their client's behalf. The rates charged by both counsel appear to be well within the range of the rates charged by individuals with comparable legal experience in Philadelphia. (See Plaintiff's Exhibits B and C.) Furthermore, plaintiff itemizes the costs associated with the litigation, including deposition transcript expenses and filing fees, and I conclude these are reasonable. Defendant does not assail the reasonableness of the rates charged by the attorneys, nor does it contest the amount of hours spent on the case or the costs, beyond the objections already addressed. Therefore, I find that, subject to the above-discussed deductions, plaintiff's request for attorneys' fees is reasonable and shall be granted.[7]

An appropriate Order follows.

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7. Plaintiff's request was for a total of $132,159.49. As discussed above, I will deduct from that amount what I consider to be duplicative fees in the amount of $9,555.00 ($5,950 from Mr. McElhatton, $3,605 from Mr. Foley). The result is an award of $122,604.49.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 98-906

EDWARD J. FOLEY, SR.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,

Defendants.

ORDER

AND NOW this 7th day of December, 2000, upon consideration of the motion of defendants John Dougherty and Edward Nielson, in their capacities as officers of the International Brotherhood of Electrical Workers Union Local 98 ("Local 98"), for allowance of attorneys' fees under the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401, *et seq.* ("LMRDA") (Document No. 61), and the motion of plaintiff Edward J. Foley, Sr., for attorneys' fees under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") (Document No. 80), and having concluded, for the reasons stated in the foregoing memorandum, that defendants Dougherty and Nielson are

not entitled to attorneys' fees under LMRDA, and that plaintiff is entitled to attorneys' fees under ERISA, **IT IS HEREBY ORDERED** that

(1) the motion of defendants Dougherty and Nielson is **DENIED**; and

(2) the motion of plaintiff is **GRANTED**, and the Local 98 pension fund shall reimburse plaintiff in the amount of $122,604.49.

s/ Lowell A. Reed, Jr.
LOWELL A. REED, JR., S.J.

APPENDIX D — OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AUGUST 25, 2000 AND FILED AUGUST 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 98-906

EDWARD J. FOLEY, SR.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

Reed, S.J. **August 25, 2000**

This action arises out of the decision of defendant International Brotherhood of Electrical Workers Local Union 98 Pension Fund to deny a portion of the pension benefits sought by plaintiff Edward J. Foley, Sr. Plaintiff seeks to recover the denied portion of his pension benefits under the

Appendix D

Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"). Having conducted a non-jury civil trial on August 21 and 22, 2000, at which counsel for all parties participated, and based upon the pleadings, the exhibits, the stipulations, and testimony presented at trial, and the arguments of counsel, this Court now makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT[1]

1. Plaintiff Edward J. Foley, Sr. ("Foley"), is a participant in the International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan ("Plan"). (Revised Stipulated Facts, at ¶ 23) ("Stipulation").

2. The plan is administered by the Board of Trustees ("Trustees") of defendant International Brotherhood of Electrical Workers Local Union No. 98 Pension Fund ("Fund"), with the assistance of counsel and staff. (Stipulation, at ¶ 5).

3. The Plan provides that for the years prior to 1975, a participant suffers a break in service and forfeits all prior credited service if he or she failed to work in covered employment for at least a total of 600 hours in a consecutive two-year-period. (Plan, Art. I, § C(1)(a), (b), pp. 2-3, Plaintiff Exh. 1; Stipulation, at ¶ 7)

4. The Plan contains an exception from its break-in-service rule under which a participant will be excused from his

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1. To the extent that these findings of fact include conclusions of law or mixed findings of fact and conclusions of law, these findings and conclusions are hereby adopted by this Court.

or her break in service and will not lose the pension credits already earned for those prior years if was, during the break in service, "continuously available for work within the jurisdiction of the Union and was unable to obtain Covered Employment" ("break-in-service exception"). (Plan, Art. I, Section C(1)(c)(i), p. 3, Plaintiff's Exh. 1; Stipulation, at ¶ 8).

85. The Plan provides "that all . . . interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated." (Plan, Art. V(A)(1), p. 45, Plaintiff's Exh. 1).

9. Plaintiff worked in covered employment during the years 1959 to 1971, earning 12.5 years of pension credits under the Plan. (Stipulation, at ¶ 24).

10. Plaintiff did not work in covered employment from 1972 to 1981, and thus experienced a break in service under the Plan. (Stipulation, at ¶¶ 20, 27).

11. Plaintiff returned to covered employment in 1981, and retired in 1996. (Testimony of Edward J. Foley, Sr.).

12. In December 1988, the Trustees resolved to grant plaintiff eligibility to receive the pension credits accumulated prior to his break in service under the break-in-service exception. The minutes of the 1988 meeting reflect that Foley's 12.5 years of credited service accrued from 1959-71 were restored after an investigation by Fund counsel revealed that Foley was

available for work but unable to locate work for the period 1972 through 1980. (Stipulation, at ¶¶ 10, 29).

13. On October 28, 1994, former Trustee Fred J. Compton sent a letter to Fund counsel, Laurance E. Baccini, in which Compton accused Foley of misleading the Trustees with respect to the 1988 resolution to grant Foley an exception from the loss of accrued credits under the break-in-service rule. (Stipulation, at ¶¶ 13, 30).

14. In response to Compton's letter, the Trustees created a subcommittee consisting of Trustee Thomas J. Reilly, Jr., and Fund counsel, Laurance E. Baccini, as staff, to investigate Compton's allegations. (Stipulation, at ¶ 31).

15. The subcommittee conducted an investigation and prepared a Confidential Report to the Trustees of the I.B.E.W. Local 98 Pension Plan Regarding Edward Foley ("Confidential Report"). (Stipulation, at ¶¶ 15, 32).

16. The Confidential Report was presented to the Trustees at some time prior to February 22, 1995. (Testimony of Thomas J. Reilly, Jr., Roy Dantz, Dennis Link).

17. The Confidential Report contained a finding that prior to Foley's case coming before the Trustees, the "available for work-no work available exception ha[d] been applied liberally in almost all cases in which it has been invoked." (Confidential Report, at 6, Plaintiff's Exh. 2).

18. Under a sub-heading entitled "Construe the available for work-no work available exception much more

strictly," the report found a lack of evidence of Foley's availability for work from 1972-81 and observed, "This is nothing unique as to Mr. Foley's case. Almost all of the other participants who received the benefit of the available for work-no work available exception had similarly sketchy employment information that was made available to the Trustees." (Confidential Report, at 8, Plaintiff's Exh. 2).

19. The Confidential Report further provided, "If the Trustees decide to examine Mr. Foley's record in light of a stricter application of the available for work-no work available exception, all of the other pension records for those individuals set forth on Exhibit 4 would have to be examined and appropriate adjustments made." (Confidential Report, 8-9, Plaintiff's Exh. 2; Stipulation, at ¶ 34).

20. Attached to the Confidential Report was Exhibit 4 thereto; a list of 21 plan participants who had sought eligibility for the break-in-service exception prior to the Foley matter. (Confidential Report, Exh. 4, Plaintiff's Exh. 2).

21. On February 22, 1995, during a special meeting, the Trustees discussed the Confidential Report and additional evidence concerning plaintiff's availability for work and the availability of work during plaintiff's break in service, and unanimously resolved to (1) reverse their 1988 decision granting Foley eligibility for his 1959-71 pension credits under the break-in-service exception, (2) offer Foley an opportunity to resubmit the issue to the Trustees with additional documentation; and (3) reinvestigate all other prior similar situations for the purpose of determining

if the decision at the relevant time was supported by evidence. (Notes of Dennis Link, Feb. 23, 1995, Plaintiff's Exh. 26; Stipulation, at ¶¶ 16, 35).

22. On July 22, 1996, Foley applied for an early retirement pension and submitted an application for benefits to the Fund. (Stipulation, at ¶ 37).

23. The Trustees considered Foley's application for benefits during a special meeting on November 22, 1996. The Trustees denied his application for pension benefits earned during the years 1959-71 because "there remain[ed] insufficient evidence as to the unavailability of work and Mr. Foley's inability to obtain covered employment during the Plan years 1972, 1973, and 1974." (Minutes of the Special Meeting of the Board of Trustees of the I.B.E.W. Local Union No. 98 Pension Fund, Nov. 22, 1996. Plaintiff's Exh. 16; Stipulation, at ¶¶ 21, 38, 39).

24. The decision of the Trustees in November 1996 to deny Foley's application for pension credits accrued from 1959-71 was based on their February 1995 resolution declaring plaintiff ineligible for the break-in-service exception, and the fact that Foley had presented no new evidence to support his application between February 1995 and November 1996. (Letter of Scott Ernsberger, April 16, 1997, Plaintiff's Exh. 20; Minutes of Special Meeting of the Board of Trustees of the I.B.E.W. Local Union No. 98 Pension Fund, Nov. 22, 1996, Plaintiff's Exh. 16).

Appendix D

25. On October 22, 1997, the Trustees rejected Foley's appeal of the denial of his application for credit for the years 1959-71. (Letter of Laurence E. Baccini, Oct. 22, 1997, Defendants' Exh. 17).

26. In making the February 1995, November 1996, and October 1997 decisions, the Trustees relied on the evidence and recommendations contained in the Confidential Report. (Testimony of Thomas J. Reilly, Jr., Roy Dantz, Dennis Link, John Dougherty, Larry Bradley).

27. The Trustees informed plaintiff through Fund staff and counsel that to prevail on his claim for pension benefits for the years 1959-71, Foley needed to produce additional evidence, in the form of affidavits, documents, or otherwise, to prove his availability for work and the unavailability of work during the years of his break in service 1972, 1973, and 1974. (Stipulation, at ¶ 36; Letter of Scott Ernsberger, April 16, 1997, at 3-4, Plaintiff's Exh. 20; Letter of Laurence Baccini, Oct. 22, 1997, at 3, Defendants' Exh. 17).

28. In general, Foley was similarly situated to all journeyman members of Local 98 with respect to his application for pension benefits, and therefore the Trustees were required under the terms of the Plan to treat his application in the same manner they would treat the application of any journeyman member of Local 98. (Plan, at 45, Plaintiff's Exh. 1; Testimony of Roy Dantz).

29. In particular, because Foley sought to qualify for the break-in-service exception, he was similarly situated to all journeyman members of Local 98 who had applied

for the break-in-service provision, including those listed on Exhibit 4 to the Confidential Report. (Confidential Report, at 8-9, Exh. 4, Plaintiff's Exh. 2). The individuals listed in Exhibit 4 are similarly situated to Foley despite minor distinctions between the evidence advanced by Foley and the evidence presented by those individuals.[2]

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2. During closing arguments, counsel for defendants argued that plaintiff was not similarly situated to the persons listed in Exhibit 4 of the Confidential Report by drawing several distinctions that I find are not meaningful or persuasive. Counsel asserted that a number of the individuals in Exhibit 4 had signed the Local's out-of work book, and that plaintiff had not. However, the Exhibit 4 reflects that both Terry Keim and Daniel P. Murry were members of the Union and therefore "did not have to" or were "not required to" sign the book. (Confidential Report, Exhibit 4). Foley remained a member of the union during his break in service, and therefore, if treated equally, was not required to sign the book. A number of individuals listed in Exhibit 4 who apparently did not sign the book (Murry, Scott, Rogan, Keim, and Oechsle) were granted the break-in-service exception nonetheless.

Defendants produced evidence that plaintiff claimed he was unable to obtain work during a time when there was plenty of work available to union members (1972-74), however, according to Exhibit 4, the Trustees granted eligibility under the break-in-service exception, and therefore necessarily concluded that work was not available, to a number of individuals for those years, including Joseph Zolo (1974), William Lambert (1974), David Osechsle (1974), Charles Scott (1974), Garland Freeman (1974), Ronald Rubin (1974), Richard Mariano (1972-74), James R. Scott (1974), and Robert Robinson (1973-74).

Defendants also argued that the allegations of impropriety that were raised in Compton's letter concerning Foley's pension benefits demanded different treatment. However, as noted in this Court's

(Cont'd)

30. The Court accepts the testimony of the Trustees that they believed in good faith, both at the time they made their decision and at the time of their testimony, that they did not treat Foley differently from those similarly situated or hold Foley to a stricter standard of proof with respect to his eligibility for the break-in-service exception.

(Cont'd)

decision on summary judgment, the letter might have justified a review of plaintiff's claim to determine whether there was any impropriety, but it did not justify the setting of a higher evidentiary threshold for plaintiff, and no one else, simply because an accusation had been made. *See Foley v. International Broth. of Elec. Workers Local 98 Pension Fund*, 91 F.Supp.2d 797, 806 n. 14 (E.D.Pa.2000). Morever, the Confidential Report summarizing the investigation triggered by the letter presented no evidence of wrongdoing or deceit on the part of Foley, and Fund counsel acknowledged to Foley the absence of evidence of improper conduct, and that the Trustee's demand for additional information was not based on a finding of impropriety. (Undated Notes of Laurence E. Baccini, Fund Counsel).

Even if there were minor differences between Foley and the individuals listed in Exhibit 4, the result of my decision today would be no different. Foley is one of a number of individuals who sought refuge under the break-in-service exception, and the evidence produced a trial demonstrates that a number of other individuals who, like Foley, produced a miniscule amount of evidence to show that they were available for work and that work was available, were granted the break-in-service exception, and that Foley was not. The evidence presented at trial proves that Foley was similarly situated to all journeymen who had applied for the break-in-service exception, and there was no persuasive evidence presented at trial that any other individual who applied for the break-in-service exception was investigated by the Trustees at all and no evidence that the Trustees scrutinized the application of any other individual with vigor remotely similar to that which they applied to Foley's application.

Appendix D

(Testimony of Thomas J. Reilly, Jr., Roy Dantz, Dennis Link, Larry Bradley, John J. Dougherty).

31. Direct evidence of the subjective belief of the Trustees, is not dispositive. Also relevant is circumstantial evidence from which this Court infers that despite the fact that the Trustees believed they were not applying a stricter standard in their consideration of plaintiff's eligibility for the break-in-service exception, the Trustees *in fact* held plaintiff to a stricter standard of proof than any other individual in like circumstances.

32. There is no evidence that a subcommittee of the Board of Trustees was formed after February 1995 to investigate any other individual seeking eligibility under the break-in-service exception, including those individuals listed in Exhibit 4 of the Confidential Report. (Testimony of Thomas J. Reilly, Jr.).

33. There is no evidence that, following the February 1995 resolution of the Trustees to deny Foley eligibility for pension credits he accumulated from 1959-71, the Trustees received or considered any written staff or committee report concerning any individuals who had applied for the break-in-service exception, including the individuals listed in Exhibit 4. (Testimony of John J. Dougherty).

34. There is no persuasive evidence that, following the February 1995 resolution of the Trustees, any investigation of other persons who had sought eligibility for pension credits under the break-in-service exception,

including the 21 individuals whose names appear in Exhibit 4 to the Confidential Report, was conducted by the Trustees or by Fund staff. (Testimony of Scott Ernsberger, Thomas J. Reilly, Jr., Roy Dantz, Dennis Link,[3] John J. Dougherty).

35. There is no persuasive evidence that, following the February 1995 resolution of the Trustees, any individuals similarly situated to Foley were required to produce additional evidence of their availability for work or the availability of work during their alleged break in service. (*Id.*).

36. There is no persuasive evidence that, prior to February 1995, the Trustees ever formed a subcommittee to investigate any other plan participant's pension application, received or considered a written report upon the application of any other individual for pension benefits, or required a person to produce additional evidence of their availability for work or the availability of work under the break-in-service exception. (Testimony of Thomas J. Reilly, Jr.).

37. Based on the foregoing, the Court finds that plaintiff has proved by a preponderance of the evidence that the Trustees in fact treated Foley differently from other

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3. This Court is not persuaded otherwise by the testimony of Dennis Link that he "may have received" additional information about the individuals listed on Exhibit 4 of the Confidential Report; Link could not specify when or in what form or detail that information was received, nor did he produce documentary evidence of such a report. (Testimony of Dennis Link).

persons similarly situated to him with respect to his application for pension benefits by subjecting Foley's petition for eligibility under the break-in-service exception to a stricter standard of review and requiring him to produce evidence beyond that required of journeyman members of Local 98 seeking eligibility for the break-in-service exception.

Damages

Based on the uncontroverted evidence of damages presented at trial and in plaintiff's pretrial filings, the Court makes the following findings as to damages:

38. Plaintiff has accrued 27.5 years of benefit credits under the Plan. (Pension Summary for Edward J. Foley, Sr., Plaintiff's Exh. 4).

39. Plaintiff's accumulated monthly pension benefit is $1,387.43. (*Id.*)

40. Plaintiff is entitled to an early retirement benefit under Article II, Section D and Article III, Section B of the Plan. (Plan, at 21-22, 35-36, Plaintiff's Exh. 1).

41. The amount of pension benefit payments due to Foley under the Plan as of August 1, 2000, with interest, is $78,747.76.

42. The amount of the early retirement benefit payments due to Foley under the Plan as of August 1, 2000, with interest, is $20,876.89.

43. The total amount of past-due benefits plaintiff is entitled to recover is $99,624.65.

III. CONCLUSIONS OF LAW[4]

44. This action arises under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), and the parties hereto are bound by the terms of ERISA.

45. The International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan is a multiemployer pension benefit Plan Pursuant to 29 U.S.C. §§ 1002(2)(A), 1002(37)(A)(ii).

46. Plaintiff Edward J. Foley, Sr., is a participant in the Plan within the meaning of 29 U.S.C. § 1002(7).

47. The denial of plaintiff's application for benefits is subject to an arbitrary and capricious standard of review by this Court. *See Foley v. International Broth. of Elec. Workers Local 98 Pension Fund*, 91 F.Supp.2d 797, 805 (E.D.Pa.2000) (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111, 109 S.Ct. 948 (1989); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 437 (3d Cir. 1997)).

48. A decision to deny benefits is arbitrary and capricious if it results in the disparate treatment of one person from all other persons similarly situated. Disparate treatment

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4. To the extent that these conclusions of law include findings of fact or mixed findings of fact and conclusions of law, these findings and conclusions are hereby adopted by this Court.

includes subjecting an individual to a stricter standard of proof than that applied to any other individual similarly situated. *See Foley*, 91 F.Supp.2d at 805-06.

49. Having found that Foley was treated differently from all other persons similarly situated in that his petition for eligibility under the break-in-service exception was subjected to a more demanding evidentiary standard and a stricter level of scrutiny than the petitions of those similarly situated to him (Finding of Fact No. 18), I conclude that the 1996 decision of the Trustees to deny plaintiff's application for benefits for the years 1959-71 was arbitrary and capricious, and that the decision clearly violated the terms of the Plan, which requires "that all . . . interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated." (Plan, Art. V, Sec. A, Sub. 1, p. 45, Plaintiff's Exh. 1).

50. Because the decision of the Trustees to deny plaintiff's application for benefits was arbitrary and capricious and was inconsistent with the terms of the Plan, I conclude that plaintiff is entitled to a recovery of benefits under 29 U.S.C. § 1132(a)(1)(B).

51. Therefore, judgment will be granted in favor of Foley in the amount of $99,624.65. (Findings of Fact No. 41, 42, 43), and the Trustees will be ordered to reinstate plaintiff's monthly pension benefit.

52. Because I have determined that plaintiff has an available remedy under 29 U.S.C. § 1132(a)(1)(B), plaintiff may

not proceed on his claim for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3). *See Foley*, 91 F.Supp.2d at 807 n. 15. Therefore, the claims against the Fund and all individual defendants under § 1132(a)(3) will be denied.

IV. VERDICT

Having concluded that plaintiff Edward J. Foley, Sr., is entitled to a recovery of benefits due to him under the terms of the plan pursuant to ERISA, 29 U.S.C. § 1132(a)(1)(B), and based on the foregoing findings and conclusions, my verdict is in favor of Foley for the amount of monthly pension benefits and an early retirement bonus due as of August 1, 2000, $99,624.65. Furthermore, plaintiff's eligibility for his monthly pension benefit shall be reinstated in a manner consistent with the foregoing and the terms of the Plan.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 98-906

EDWARD J. FOLEY, SR.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,

Defendants.

JUDGMENT

AND NOW this 25th day of August, 2000, **JUDGMENT IS HEREBY ENTERED** on the verdict in favor of plaintiff Edward J. Foley, Sr., and against the International Brotherhood of Electrical Workers Local Union 98 Pension Fund in the amount of $99,624.65.

IT IS FURTHER ORDERED that the Trustees shall reinstate plaintiff's pension benefits in a manner consistent with the foregoing findings and conclusions and the terms of the International Brotherhood of Electrical Workers Local Union 98 Local 98 Pension Plan

IT IS FURTHER ORDERED that the claims against all defendants for breach of fiduciary duty pursuant to 29 U.S.C. § 1132 (a) (3) are DENIED.

s/ Lowell A. Reed, Jr.
Lowell A. Reed, Jr., S.J.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 20, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 00-2767 & 00-4427

EDWARD J. FOLEY, SR.,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NIELSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY J. BRADLEY, in his capacity as a TRUSTEE; FRED J. COMPTON

International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, in his capacity as a Trustee, Edward Nielson, in his capacity as a Trustee, Joseph Agresti, in his capacity as a Trustee, Thomas J. Reilly, Jr., in his capacity as a

Appendix E

Trustee, Dennis Link, in his capacity as a Trustee,
William C. Rhodes, in his capacity as a Trustee,
Roy Dantz, in his capacity as a Former Trustee,
and Larry Bradley, in his capacity as a Former Trustee
(Collectively the "Defendants"),

Appellants at No. 00-2767

EDWARD J. FOLEY, SR.,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98 OF AMERICA; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NIELSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LAWRENCE J. BRADLEY, in his capacity as a TRUSTEE,

Appellants at No. 00-4427

and FRED COMPTON

Appendix E

(D.C. Civ. No. 98-906)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, BARRY, AMBRO, FUENTES,
GREENBERG* and COWEN*, *Circuit Judges*

The petition for rehearing filed by appellee, Edward J. Foley, Sr., in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/ [illegible]
Circuit Judge

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* As to panel rehearing only.

(2)

No. 01-1433

Supreme Court, U.S.
FILED
APR 2 6 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EDWARD J. FOLEY, SR.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

When a Federal Court of Appeals reviews an ERISA § 502(a)(1)(B) partial denial of benefits claim under an arbitrary and capricious standard of review, may it reverse the District Court's conclusion that the Trustees acted in an arbitrary and capricious manner, which the District Court specifically rejected, and which was not cross appealed by Petitioner to the Court of Appeals, with a rationale that was not argued by the Petitioner before the Court of Appeals?

When a Federal Court of Appeals indicates, in a footnote in another case, that it will follow the decisional law enunciated by several other courts of appeal, does a conflict in the various circuits arise within the meaning of Rule 10(a) of the Rules of the Supreme Court of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner

Edward J. Foley, Sr.

Respondent

International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

Other Parties

The International Brotherhood of Electrical Workers Local 98; Trustees John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link, William Rhodes, Roy Dantz and Larry Bradley and Union Officers John J. Dougherty, Edward Neilson and Fred Compton were parties to the proceedings below and have no legal interest in the outcome of this Petition for a Writ of Certiorari.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

ARGUMENT 1

STATEMENT OF THE CASE 1

WAIVER 4

RULE 10(a) 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Matuszak v. Torrington Co., 927 F.2d 320 (7th Cir. 1991) 5

Skretvedt v. E.I. Dupont De Nemours and Co., 268 F.3d 167 (3d Cir. 2001) 7

United States v. Williams, 504 U.S. 36 (1992) 4

STATUTES

ERISA § 502(a)(1)(B) 6

RULES

Sup. Ct. R. 10 6

Sup. Ct. R. 10(a) 1, 6

Sup. Ct. R. 15 1

ARGUMENT

Respondent, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan, respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the judgment filed in this case because petitioner waived the issue presented for review – post hoc rationalization – and because he fails to make out a case for a Writ of Certiorari under Rule 10(a).

STATEMENT OF THE CASE

Rule 15 of the Rules of the Supreme Court of the United States, entitled Briefs in Opposition; Reply Briefs; Supplemental Briefs, provides at Paragraph 2 as follows:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

The treatment of the case below raises the issue of waiver. The Petitioner's Brief contains certain citations to the opinions of the District Court but the quoted material

cited as support does not support statements set forth on the pages of the Petition for a Writ of Certiorari.

The following constitutes misstatements of the opinions of the lower Court that are relevant to this Court's decision with respect to the issues raised in this opposition:

MISSTATEMENT- Petitioner's Brief	PAGE CITATION
"The petitioner, Edward J. Foley, Sr., . . . suffered a break in service in 1973 and forfeited 12 and half [sic] years of credited service. . . . . (App. D, at pp. 75a-76a)".	This citation to the record does not support the language appearing on page 2 at lines 6 through 10 of the Petition for a Writ of Certiorari.
"[M]ailed a letter to Plan [sic] alleging that Foley 'may have . . . misled or misinformed the Trustees' with respect to the restoration of his pension credits. *The Plan reviewed this matter for a second time and found that the accusations were baseless and groundless.* (App. D, pp. 77a, 81a-82a, note 2)" (emphasis added).	This citation to the record does not support the language appearing on page 2 at lines 16 through 21 of the Petition for a Writ of Certiorari.

"In the report Foley was compared to the 21 other individuals who had ever applied for the exception to the break in service rule and the Trustees found Foley to be similarly situated to these 21 individuals. (App. D, at pp. 78a, 81a, App B, at pg. 37a, note 12)".	This citation to the record does not support the language that appears on pages 2 through 3 at page 2, line 27 through page 3, line 5 of the Petition for a Writ of Certiorari.
"Initially, Plan Counsel argued that the Trustees were entitled to treat Foley differently than all other plan participants merely because unsubstantiated allegations were raised against him. (App. B at pg. 38a, note 14)".	This citation to the record does not support the language appearing on page 3 at lines 13 through 18 of the Petition for a Writ of Certiorari.
"The District Court rejected plan counsels arguments that ran contrary to the Trustees testimony and documents introduced into evidence and instead accepted the Trustees testimony that they believed in good faith that they treated Foley the same as all other plan participants. (App. D, at pg. 82a)".	None of the language set forth on page 4 at lines 8 through 13 of the Petition for a Writ of Certiorari is supported by the citation to the record.

"Because the Trustees held Foley to a higher evidentiary standard than any other Plan participant who had sought refuge under the exception to the break in service rule the District Court found that the Trustees arbitrarily and capriciously denied Foley pension benefits and ordered the pension credits reinstated. (App. D, at pp. 80a, 85a, 87a, 88a)."	There is no mention of arbitrariness and capriciousness on pages 80a, 85a or 88a, and this cannot support the language set forth on page 4 at lines 13 through 19 of the Petition for a Writ of Certiorari.

WAIVER

This Court previously explained what "waiver" is with respect to issues that are sought to be brought before the Court as follows:

> "Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon [by the court] below'." *United States v. Williams*, 504 U.S. 36, 41 (1992).

It is beyond doubt that the Court of Appeals never "passed upon" the issue of post hoc rationalization as that principle is enunciated in Petitioner's Brief submitted in this case. Indeed, the court's opinion is completely devoid of the term. See Appendix A to Petition for a Writ of Certiorari.

It is submitted that the Petitioner never effectively pressed for a resolution of its post hoc rationalization

theory at any stage of these proceedings. In the District Court, plaintiff asserted that the decision of the United States Court of Appeals for the Seventh Circuit in *Matuszak v. Torrington Co.*, 927 F.2d 320 (7th Cir. 1991) (footnote 10) supported plaintiff's "new reason" argument resulting in an obligation on the part of the District Court to apply a *de novo* review to the claims made by plaintiff. The District Court rejected this argument for two reasons. The first reason was, as a factual matter, that the Trustees had not advanced plaintiff's alleged misconduct as the reason for which his benefits were denied. The second reason was that a failure to adopt misconduct as a justification for denying benefits would not constitute a new reason on the part of the Trustees. The District Court ruled against the plaintiff's claims when it argued that defendants had raised allegations of plaintiff's misconduct as a new reason for denying him benefits. This reason was not set forth in any of the prior denial-related correspondence with the Trustees. (App. B at pp. 34a-35a). On appeal, after the District Court entered its verdict in plaintiff's favor, plaintiff did not cross-appeal the District Court's failure to adopt its "new reason" argument. In its counterstatement portion of its Brief, plaintiff stated that Appellants changed their defense theory several times but, when it came to the argument section of the Brief, this subject was completely abandoned.

Plaintiff filed a Petition for Rehearing and for Rehearing *en banc* on November 21, 2001. As grounds in support of the petition, plaintiff asserted that the decision of the United States Court of Appeals for the Third Circuit sets up a needless conflict with all other circuits that

have ruled on the issue of whether post hoc rationalization is permissible in an ERISA § 502(a)(1)(B) claim for benefits, taking a position contrary to the authoritative opinions of the Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

Plaintiff should not have couched his Petition for Rehearing in this fashion since he failed to argue the substance of it before the Court of Appeals. While he argued the issue of post hoc rationalization before the Court of Appeals for the Third Circuit, he did so only in his Petition for Rehearing and not in his main argument before the court. It was erroneous for plaintiff to have characterized the Third Circuit's action as setting up a needless conflict with all other Circuits that have ruled on this issue. The Third Circuit had already ruled favorably with respect to the issue of post hoc rationalization. Under these circumstances, the *Foley* decision sets up no conflict with other circuits and Plaintiff's failure to properly press the issue of post hoc rationalization is obvious.

RULE 10(a)

Rule 10 of the Rules of the Supreme Court of the United States provides that "a petition for a writ of certiorari will be granted only for compelling reasons." The reason ascribed by the Petitioner is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

The matter with which the decision of the United States Court of Appeals for the Third Circuit is alleged to

conflict is the principle of law entitled "post hoc rationalization." This principle, said to have been adopted by the Second, Sixth, Eighth, Ninth and Tenth Circuits constitutes a body of law with which the decision of the Court of Appeals for the Third Circuit in the instant case is in conflict. Previously, even the Court of Appeals for the Third Circuit stated its acceptance of the principle of post hoc rationalization when it affirmed that principle of law in footnote 8 of its decision in *Skretvedt v. E.I. Dupont De Nemours and Co.*, 268 F.3d 167 (3d Cir. 2001). Petitioner asserts that because the panel in the instant case did not follow footnote 8 in the *Skretvedt* case, that constitutes a "conflict with the decision of another court of appeals on the same matter."

No conflict among circuits exists. It is true that the *Foley* case as decided by the Court of Appeals does not implicate the post hoc rationalization analysis. But this is because this type of analysis was not argued before the Court of Appeals and because a review was confined to whether the Trial Court properly applied an arbitrary and capricious review of the Trustees' decision. Indeed, the *Foley* case was not viewed by any member of the court as a post hoc rationalization case as Petitioner did not bring it to the court's attention during briefing and oral argument. Since the court was on record as endorsing the concept as post hoc rationalization, the "conflict" basis for granting the Petition for Rehearing was eliminated.

CONCLUSION

It is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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